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IN THE

Supreme Court of the United States

DARIUS MORGAN,

Petitioner,

v.

FLOYD BENNETT, Superintendent of
Elmira Correctional Facility

On Petition For Writ Of Certiorari To The
United States Court Of Appeals
For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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Question Presented

Whether the Sixth Amendment Right to Assistance of Counsel is violated by a court order forbidding defense counsel from communicating with the defendant concerning the forthcoming testimony of the prosecution's key witness.

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PETITION FOR WRIT OF CERTIORARI

Darius Morgan respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 204 F.3d 360 (2d Cir. 2000) and is set forth in the Appendix at (1a).[1] The

[1] Citations to pages of the Appendix are designated by the abbreviation "(_a)." Citations to the trial transcript are designated by the abbreviation "Tr."

opinion of the Eastern District of New York is reported at No. CV-96-4106, 1998 WL 315135 (E.D.N.Y. May 27, 1998) and is set forth in the Appendix at (23a). The order of the New York Court of Appeals denying leave to Appeal is reported as *People v. Morgan*, 588 N.E.2d 768 (1992) and is set forth in the Appendix at (45a). The opinion of the Supreme Court of New York, Appellate Division, Second Department is reported as *People v. Morgan*, 574 N.Y.S.2d 592 (App. Div. 1991) and is set forth in the Appendix at (46a).

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on February 28, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1), 2101(c).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment of the United States Constitution reads as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

A. Background

On June 7, 1989, Petitioner Darius Morgan was convicted of murder in the second degree and attempted murder in the second degree. (Tr. 786). The conviction

arose out of an incident that occurred during the early morning hours of Friday, February 28, 1987. During that incident Denise Hill was shot and wounded and Rachel Layne was shot and died shortly thereafter. (Tr. 65-66, 679).

The police did not recover any weapons and the bullets they found in the apartment could not be compared to each other, making it impossible to determine whether they were fired from one or more guns. (Tr. 652, 711). There was no circumstantial evidence connecting Mr. Morgan to the crime. The only incriminating evidence against Mr. Morgan came from the eyewitness testimony of Denise Hill.

Ms. Hill, who had been smoking free-based crack cocaine "over and over again" continuously for the six hours before the shooting, told police at her initial interview that two males entered the apartment in a drug-related robbery attempt and began shooting. (Tr. 383, 420, 569). After meeting with Ms. Layne's mother and sister, Ms. Hill told detectives that her boyfriend, Mr. Morgan, had shot both her and Ms. Layne because he was upset at the fact that he could not find his car. (Tr. 364-71).

B. Proceedings in State Court

1. Issues Surrounding Eyewitness' Testimony.

At the time that Mr. Morgan's trial began, in May 1989, the eyewitness, Ms. Hill, was incarcerated in New Jersey on convictions for armed robbery and burglary. (Tr. 451, 454). She was temporarily moved from New Jersey to Riker's Island in New York to testify at Mr. Morgan's trial. *See Morgan*, 1998 WL 315135, at *2. During the course of the trial, Ms. Hill and Mr. Morgan met and spoke with each other in the pens and on the bus between Riker's Island and the court house. Ms. Hill also wrote Mr. Morgan a love letter during this time. *See id.*

Shortly before Ms. Hill was to be brought into the courtroom on the day she was called to testify, May 30, 1989, she refused to take the witness stand, invoking her privilege against self-incrimination under the Fifth Amendment. (Tr. 230-31). During a chambers conference, outside of the presence of Mr. Morgan and the jury, the prosecutor told the court and defense counsel, for the first time, that Ms. Hill had allegedly been approached by associates of Mr. Morgan while in prison and that she was afraid to testify against Mr. Morgan because she feared for her safety and the safety of her family. (Tr. 233).

The prosecutor then requested an adjournment so that she could prepare an application for a "*Sirois* hearing," which would determine whether a witness' unwillingness to testify was caused by the defendant's misconduct, in which case "the defendant will be deemed to have waived any objection to the admissibility of the witness' prior Grand Jury testimony and said testimony may be admitted as direct evidence at the defendant's trial." *Holtzman v. Hellebrand*, 460 N.Y.S.2d 591, 597 (App. Div. 1983) (per curiam); (Tr. 237-38). The court then ordered an adjournment.

2. The Trial Court's Gag Order.

The following day, May 31, 1989, the court granted the prosecution's motion for a *Sirois* hearing. (Tr. 268). Before the hearing began, however, the prosecutor informed the court that during her most recent conversation with Ms. Hill, which occurred earlier that day, Ms. Hill indicated that she "was still afraid to testify but that she would take the stand and testify." (Tr. 280). In spite of this statement, the court concluded that there were no guarantees that Ms. Hill would testify and, consequently, decided to proceed with the *Sirois* hearing on the condition that, if Ms. Hill did agree to testify the next morning, the hearing would not be completed and would be vacated from the record. (Tr. 281-82).

The court then directed defense counsel, Mr.

Avanzino, as follows:

THE COURT: I am going to make this direction to you, Mr. Avanzino. I am going to direct that this portion of the conversation —

MR. AVANZINO: What?

THE COURT: Of the possibility that Miss Hill may testify in this case not be discussed with the defendant.

MR. AVANZINO: Your Honor, I am — naturally will follow the direction of the Court. One of the reasons that I requested that he be present at each and every stage of the proceeding was I could foresee something like that happening. Judge, it's not for me, Judge, to withhold this information from him.

THE COURT: I am directing that —

MR. AVANZINO: If your Honor is directing me, of course I am directed but I don't think it's proper, Judge.

THE COURT: Counselor, these are legal matters. They are not factual matters as to the trial proper itself where the defendant must be present. These are legal matters that the Court has discussed with counsel in chambers outside the presence of the defendant.

MR. AVANZINO: Your Honor, I must be fair and honest with the court.

THE COURT: You have an exception.

MR. AVANZINO: I don't know any way to be. He has already asked me what's gone on in chambers after I have related to him as fully as I can everything that's gone on and it may be a mistaken notion that he has the right to know and I have told him that. (Tr. 282-83).

The court then proceeded with the *Sirois* hearing. The sole witness at that hearing was Detective Catherine Latawiek who had spoken with Ms. Hill several times, most recently that same morning. (Tr. 292). No other witnesses testified at the *Sirois* hearing and the court did not issue a ruling because Ms. Hill, as expected, testified the next morning, June 1, 1989. (Tr. 330).

Before Ms. Hill took the stand, the court appointed an attorney, Mr. Kranz, to represent her in light of Ms. Hill's desire to invoke the Fifth Amendment. Once it was clear that this attorney would be ready to intervene during examination to protect her, Ms. Hill proceeded to testify. (Tr. 242).

Ms. Hill implicated Mr. Morgan. Ultimately, the jury convicted Mr. Morgan of murder in the second degree and attempted murder in the second degree. (Tr. 785-89). He was sentenced to twenty-five years to life for the murder and ten to twenty years for the attempted murder.

3. The Decision of the Supreme Court of New York, Appellate Division.

On appeal to the Appellate Division of the Supreme Court of New York, Mr. Morgan raised, *inter alia*, the claim that the gag order of the trial court, which prevented his attorney from telling him of Ms. Hill's decision to testify, violated his right of access to counsel guaranteed by the Sixth Amendment. The Appellate Division rejected this claim and affirmed the conviction on the grounds that a limited restriction on a defendant's access to his attorney does not violate the Sixth Amendment. Since the gag order "did not prohibit all conversations between the defendant and his attorney," *Morgan*, 574 N.Y.S.2d at 593, the Appellate Division did not find any error of law requiring reversal.

Mr. Morgan sought leave to appeal the Appellate Division's decision to the New York Court of Appeals but

was denied. *See Morgan*, 588 N.E.2d at 768.

C. Proceedings in Federal Court

1. The Decision of the Eastern District of New York.

On August 20, 1996, Mr. Morgan filed a motion under 28 U.S.C. § 2254 to vacate, set aside, or correct his sentence in the United States District Court for the Eastern District of New York. *See Morgan*, 1998 WL 315135, at *1.

The District Court denied the access to counsel claim on the merits. Although the court recognized that a complete ban on counsel-defendant communications for a lengthy period would have been unconstitutional, it noted that the

> prohibition in this case did not prevent defendant from conferring with his counsel "altogether." *Perry v. Leeke*, 488 U.S. 272, 280 (1989) (*citing Strickland v. Washington*, 466 U.S. 668, 692 (1984)). Indeed it did not preclude petitioner from seeking any advice or guidance from his lawyer, and his lawyer was free to discuss anything relating to the trial except the fact that Denise Hill was again likely to testify. This restriction was justified by the prior threats against Denise Hill.

Morgan, 1998 WL 315135, at *6.

2. The Decision of the United States Court of Appeals for the Second Circuit.

The Second Circuit affirmed the District Court's decision on the access to counsel claim.

After reviewing the governing law defining a defendant's constitutional right of access to counsel as stated by this Court in *Geders v. United States*, 425 U.S. 80

(1976) and *Perry v. Leeke*, 488 U.S. 272 (1989), the Second Circuit laid down a rule which makes it permissible for a trial court to deprive a criminal defendant of his Sixth Amendment right of access to counsel in order to meet a countervailing governmental interest:

> [T]he court should not, absent an important need to protect a countervailing interest, restrict the defendant's ability to consult with his attorney, but . . . when such a need is present and is difficult to fulfill in other ways, a carefully tailored, limited restriction on the defendant's right to consult counsel is permissible.

Morgan, 204 F.3d at 367.

Applying the principles set forth in this rule, the Second Circuit held that the trial court's interest in maintaining witness safety was essential to protecting the integrity of the judicial process and, accordingly, ruled that the gag order placed between Mr. Morgan and his attorney was not an unreasonable application of this Court's decisions in *Geders* and *Perry*. *See Morgan*, 204 F.3d at 368.[2]

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[2] The Second Circuit vacated and remanded for further proceedings the District Court's denial of a separate claim on procedural grounds. Those proceedings are currently in progress before Chief Judge Edward R. Korman of the Eastern District of New York.

In accordance with Supreme Court Rule 13, the Petitioner is submitting this Petition for a Writ of Certiorari within 90 days after entry of the Second Circuit's decision affirming the denial by the District Court of the claim discussed herein. The Second Circuit's denial of this claim is a final judgment appropriate for certiorari review by this Court. This Court has granted certiorari to review a final judgment as to one part of a case in spite of the fact that the court of appeals remanded another part of the same case for further proceedings before the district court. *See e.g., Board of Regents of the Univ. of Wis. Sys. v. Southworth*, 120 S. Ct. 1346 (2000); *Hanlon v. Berger*, 526 U.S. 808 (1999).

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Second Circuit has decided an important federal question in a way that conflicts with the relevant decisions of this Court, and has entered a decision in conflict with the decisions of other United States Courts of Appeals on the same important matter.

I. THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE RELEVANT DECISIONS OF THIS COURT.

The Second Circuit's decision conflicts with the relevant decisions of this Court in two ways. First, it permits defendants, like Mr. Morgan, to be deprived of their Sixth Amendment right to have unrestricted access to counsel for advice on trial-related matters. Second, the Second Circuit has adopted a balancing test which does not conform to the jurisprudential guidelines set forth by this Court.

Trial courts have broad discretion to control the progress and the shape of the trial. *See Geders*, 425 U.S. at 87. Certainly, the trial court's concern for maintaining the integrity of the judicial process includes a need to ensure witness safety. *See Morgan*, 204 F.3d at 368; S. Rep. No. 97-532, at 10 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2515, 2516. ("Without the cooperation of victims and witnesses, the criminal justice system would simply cease to function and few criminals, if any, would be brought to justice."). We do not criticize the Second Circuit for respecting that important need.

However, the balancing test set forth by the Second Circuit does not constitute an appropriate method for reconciling the defendant's constitutional right of unrestricted access to counsel with an important coun-

tervailing interest, such as the need to protect a witness. Instead of presenting the question as a choice between either allowing the defendant to communicate with his attorney, or taking a risk that a witness might be harmed, both the trial court and the Second Circuit should have recognized that these interests must be harmonized, not placed in opposition to each other, in order to achieve the aim of protecting the integrity of the judicial process. Consequently, the Second Circuit's balancing test is at odds with both the constitutional guarantees of the Sixth Amendment, and the guidelines set forth by this Court for resolving conflicts like the one presented here. This rule is, therefore, novel; it allows trial courts to deprive a defendant of a constitutionally guaranteed right in order to meet a countervailing interest, which, though important, is not of a constitutional dimension. Whether or not the limits of the trial court's discretion may be so extended is a serious question which calls for this Court's guidance.

A. The Second Circuit's Rule Deprives the Defendant of His Sixth Amendment Right of Unrestricted Access to Counsel.

This Court's decisions in *Geders v. United States*[3] and

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[3] The gag order in *Geders* barred all communication between a defendant and his attorney during a seventeen-hour overnight recess taken while the defendant was testifying. *See Geders*, 425 U.S. at 82. The Court acknowledged that the trial court had broad powers to sequester witnesses during recesses with one exception: the defendant. Although the Court was sympathetic to the trial court's objective, preserving the truth-seeking function of the trial by preventing witness coaching, it found that the Sixth Amendment mandated that the defendant be allowed to communicate with his attorney because, as a party to the proceeding, the adversary system requires that he have "the guiding hand of counsel at *every step* in the proceedings" in order to ensure a fair trial. *Id.* at 89 (quoting *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932)) (emphasis added). The Court ruled that an attorney must be able to communicate freely with his client during an overnight recess because he may, for

Perry v. Leeke[4] have unequivocally established that it is "the defendant's right to *unrestricted* access to his lawyer for advice on a variety of trial-related matters that is controlling in the context of a long recess." *Perry*, 488 U.S. at 284. The Sixth Amendment, therefore, guarantees the defendant the right to discuss with his

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instance, "need to obtain from his client information made relevant by the day's testimony." *Id.* "*At the very least*," unfettered communication is essential because it "gives the defendant a chance to discuss with counsel the significance of the day's events." *Id.* (emphasis added). Deprivation of counsel in this context was so serious an error that it constituted a *per se* violation of the Sixth Amendment. *See Perry*, 488 U.S. at 278-79 ("There is merit in petitioner's argument that a showing of prejudice is not an essential component of a violation of the rule announced in *Geders*.").

[4] *Perry* addressed an issue left open in *Geders*: the defendant's right of access to counsel during a short recess. *Perry* involved an order of the trial court which prohibited the defendant from talking to anyone, including his lawyer, during a fifteen minute recess taken during his testimony. *See Perry*, 488 U.S. at 274. As in *Geders*, the *Perry* gag order was issued to prevent the defendant from being improperly coached while on the witness stand.

In contrast to *Geders*, this Court upheld the gag order in *Perry* relying on the key distinction that "it is appropriate to presume that *nothing but the testimony*" would have been discussed between the defendant and his attorney during the short recess. *Id.* at 283-84 (emphasis added). In light of the fact that the defendant did not have a right to be coached by his attorney while on the witness stand, *id.* at 284, this Court held that a gag order which essentially barred communication on that matter alone did not deprive the defendant of his Sixth Amendment rights.

Perry, however, reaffirmed the holding of *Geders* as it pertained to long recesses where normal consultation between the defendant and his lawyer "would encompass matters that go beyond the content of the defendant's own testimony – *matters that the defendant does have a constitutional right to discuss with his lawyer, such as the availability of other witnesses*, trial tactics, or even the possibility of negotiating a plea bargain." *Id.* (emphasis added). Once the Constitution has thus been implicated, *Perry* emphasized that the law as stated by this Court in *Geders* is clear: "It is the defendant's right to *unrestricted access* to his lawyer for advice on a variety of trial-related matters that is controlling in the context of a long recess." *Id.* (citing *Geders*, 425 U.S. at 88) (emphasis added).

attorney trial-related matters, which include "the availability of other witnesses, trial tactics, or even the possibility of negotiating a plea bargain." *Id.* Counsel, on his part, has an "overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." *Strickland*, 466 U.S. at 688. A trial court, therefore, deprives the defendant of his right to the assistance of counsel, in violation of the Sixth Amendment, when it prohibits communication between him and his lawyer on matters to which the defendant is entitled to advice. *See Perry*, 488 U.S. at 284; *Geders*, 425 U.S. at 88-89.

The trial court here issued an overnight gag order which prohibited defense counsel from informing Mr. Morgan that the only eyewitness against him was going to testify the following day. This restriction applied, not to logistical matters, such as where he and his counsel could confer, or for how long, but rather to the *subject matter* of their discussion. The gag order not only barred Mr. Morgan and his lawyer from discussing the eyewitness' availability; it, in fact, precluded any consultation on, or even a simple review of, the trial strategy they would employ during her cross-examination.

Neither the Second Circuit nor any of the other courts reviewing these facts has asserted that Mr. Morgan did not have a right, protected by the Sixth Amendment to the Constitution, to discuss these matters with his attorney. It is certain that he did. *See Perry*, 488 U.S. at 284 (stating that a defendant is constitutionally entitled to discuss with counsel the availability of witnesses and trial tactics). What the Second Circuit held, however, is that, while Mr. Morgan *had* a right, guaranteed by the Sixth and Fourteenth Amendments, 1) to learn from his lawyer that the only eyewitness in his case was going to testify and 2) to review the defense's trial strategy relating to that witness, nonethe-

less, *the trial court had the discretion to deprive him of that right.* Although the decision holds that trial courts can only exercise such discretion when confronted with an important need to protect a countervailing interest, and must carefully tailor their restriction, there is no question that this rule allows trial courts to deprive the defendant of the assistance of counsel.

1. Depriving a Defendant of His Constitutional Right Creates a Substantial Risk of Prejudice.

As this Court has noted on several occasions, government can not deprive the defendant of the assistance of counsel without introducing an unacceptable risk of prejudice into the proceedings. For this reason, this Court has held that deprivations of counsel constitute prejudice *per se*. *See Strickland*, 466 U.S. at 692; *United States v. Cronic*, 466 U.S. 648, 659 n.25 (1984) ("The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding."); *Perry*, 488 U.S. at 279; *Geders*, 425 U.S. at 80; *Glasser v. United States*, 315 U.S. 60, 76 (1942) ("The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.").[5]

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[5] As stated by the District of Columbia Circuit the rationale behind this *per se* rule is that:

> To require a showing of prejudice would not only burden one of the fundamental rights enjoyed by the accused, but also would create an unacceptable risk of infringing on the attorney-client privilege. The only way that a defendant could show prejudice would be to present evidence of what he and counsel discussed, what they were prevented from discussing, and how the order altered the preparation of his defense. Presumably the government would then be free to question defendant and counsel about the discussion that did take place, to see if defendant nevertheless received adequate assistance.

Mudd v. United States, 798 F.2d 1509, 1513 (D.C. Cir. 1986)

Although a prejudice analysis is unnecessary, an examination of the record in Mr. Morgan's case provides a useful illustration of how damaging the deprivation of a defendant's Sixth Amendment rights can be to the reliability of the trial. Both the Second Circuit and the District Court believed that the gag order did not substantively harm Mr. Morgan because the defense had already been prepared to cross-examine the eyewitness when she was first called to testify. This reasoning presumes that, since the defense had been prepared when the witness was first called, defense counsel already "had ample opportunity to consult with petitioner [Mr. Morgan] in preparation for [the witness'] testimony." *See Morgan*, 1998 WL 315135, at *6. Implicit in this analysis is the assumption that the cross-examination the defense was prepared to make when the eyewitness was first called, on May 30, 1989, was substantially identical to the cross-examination that actually took place two days later, on June 1, 1989. This proposition, if it could be shown, would seem to demonstrate that the gag order did not affect the defense's efforts to prepare its case.

This reasoning is flawed. Even if the proposition could somehow be established, it proves nothing. Of course, since the defense was precluded from reviewing its strategy, defense counsel most likely cross-examined the eyewitness in the manner that he would have on May 30, 1989. The question that would determine the issue of prejudice, however, is whether the defense strategy for cross-examining the eyewitness would have been *different* in the absence of the gag order. The fact that the defense had previously prepared a cross-examination for Ms. Hill, therefore, is totally irrelevant.

Thus, a finding of prejudice would require a showing that the defense would have asked the eyewitness different questions than it did, had there been no gag order. It is impossible to make such a determination.

(citations omitted).

There is no record which indicates what the defense strategy would have been in the absence of the gag order. Any attempt to compare the eyewitness' actual cross-examination on June 1, 1989 with a hypothetical cross-examination would be nothing more than an exercise in fantasy. Nor is there any way to determine how Mr. Morgan and his attorney would have adjusted their strategy in light of the eyewitness' allegations of threats and her prior refusal to testify – facts which were available to the defense only *after* it had been prepared to cross-examine the eyewitness on May 30, 1989.

As shown here, the trial court's attempt to apply a limited restriction on Mr. Morgan's access to counsel resulted in a violation of his Sixth Amendment rights. By expressly permitting trial courts to impose such gag orders between defense counsel and the defendant, the Second Circuit's rule violates the Sixth Amendment.

B. The Second Circuit's Rule Does Not Conform to This Court's Sixth Amendment Jurisprudence.

When confronted with a potential conflict between the defendant's constitutional rights and important interests of trial administration, a trial court should "harmonize" the two in a way that best preserves the "essence" of both interests. *Maryland v. Craig*, 497 U.S. 836, 849, 857 (1990). To the extent that both the right and the interest can be harmonized, this Court has found alternatives that restrict, *but do not deprive*, the defendant of his constitutional rights, while accommodating the important countervailing interest involved. If the interest, however, cannot be protected without depriving the defendant of his constitutional right, the conflict between the two must be resolved in favor of the Constitution. *See Geders*, 425 U.S. at 91.

The Second Circuit's balancing test is not a legitimate rule which was simply misapplied in this case. It is a defective rule. It departs from this Court's guidelines on

how a conflict between fundamental constitutional rights and important governmental interests should be resolved. It should be reviewed by this Court.

1. When Confronted with a Potential Conflict Between the Defendant's Constitutional Rights and Important Governmental Interests the Trial Court Should First Seek to Harmonize the Right and the Interest.

It is well-established that trial courts have broad powers to control the progress and the shape of the trial. *See id.* at 86-87. Trial courts, for example, have the power to remove an unruly defendant from the courtroom to ensure the orderly conduct of the proceedings, *see Illinois v. Allen*, 397 U.S. 337 (1970); they may, moreover, regulate the admissibility of evidence to ensure the accuracy of the trial process. *See Rock v. Arkansas*, 483 U.S. 44 (1987). Among a trial court's duties, in this regard, is the supervision of the proper functioning of the adversarial system.

Fairness requires that evidence be subject to adversarial testing. *See Strickland*, 466 U.S. at 685. Furthermore, the adversarial system depends upon the Sixth Amendment to function properly. It is for this purpose that the Sixth Amendment guarantees all criminal defendants the right to the effective assistance of competent counsel. *See McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970); *see also Strickland*, 466 U.S. at 685 ("The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the ample opportunity to meet the case of the prosecution to which they are entitled.").

Given therefore that both the constitutional rights of the criminal defendant and the interests of trial administration have the same purpose of ensuring the fairness

and truthfulness of the judicial process, this Court has indicated that a trial court's first duty must be to reconcile the two, if at all possible, and to exercise its discretion *"within the limits of the adversary system."* *Geders*, 425 U.S. at 87 (emphasis added).

Thus, in *Bourjaily v. United States*, 483 U.S. 171, 182 (1987), this Court approached the issue of the admissibility of hearsay by a declarant who could not be confronted by the defendant, by taking steps "to *harmonize* the goal of the Confrontation Clause – placing limits on the kind of evidence that may be received against a defendant – with a societal interest in accurate fact-finding, which may require consideration of out-of-court statements." (emphasis added).

The need to "harmonize" opposing interests was again recognized in *Craig*, 497 U.S. at 849. This Court confronted the question of whether the Confrontation Clause guaranteed the accused the right to a "face-to-face courtroom encounter." *Id.* at 843. Upon conducting an analysis of the Confrontation Clause "in a manner sensitive to its purposes and sensitive to the necessities of trial and the adversary process," this Court ruled that face-to-face confrontation with witnesses was not an "indispensable element" of the Sixth Amendment's guarantee of the right to confront one's accusers. *Id.* at 849. Accordingly, an appropriate balance could be struck between this right and the effective administration of the trial. Consequently, the Court held that it was permissible for a trial court to receive by one-way closed circuit television the testimony of an alleged child abuse victim upon determining that the child's courtroom testimony would cause the child to suffer serious emotional distress. *See id.* at 853.

These cases demonstrate that this Court, when confronted with a potential conflict between the defendant's constitutional rights and governmental interests, considers solutions which limit, *but do not remove*, the defendant's rights. The Court prefers this alternative to

the approach advocated by the Second Circuit; an approach which places the competing rights and interests in direct opposition and compels a choice of one over the other.

A trial court may not make "unreasoning and arbitrary" decisions which "violate the right to the assistance of counsel." *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983); *Geders*, 425 U.S. at 87. Any rule which allows a trial court to deprive a defendant of a guaranteed right before considering alternative solutions must, at the very least, be considered unreasoning and arbitrary; the Second Circuit rule allows a trial court to deprive a defendant of a constitutional right without considering alternatives. *See Morgan*, 204 F.3d at 367. It is unreasoning and arbitrary.

In this case, the trial court could have availed itself of clear alternatives which would have protected the witness without depriving the defendant of his Sixth Amendment right. Mr. Morgan and the eyewitness, Ms. Hill, were both in custody. The court could have either 1) issued a protective order regarding Ms. Hill and her family or 2) ordered that Mr. Morgan be prevented from communicating with anyone *but* his attorney during the overnight recess.

A protective order for Ms. Hill and her family would have ensured their safety, while preserving Mr. Morgan's right of access to counsel. Similarly, an order which would have prohibited Mr. Morgan from communicating with anyone but his attorney would have accomplished all of the goals of the gag order issued here, without depriving Mr. Morgan of his rights. Such an order would have been not only entirely appropriate, but also would have yielded a more effective way of ensuring the eyewitness' safety as it could have been policed more reliably than the order issued in this case. This order could not be policed at all.

An order which prohibits a defendant from communicating with anyone but his attorney is not unprece-

dented. *United States v. Felipe*, 148 F.3d 101 (2d Cir.), *cert. denied*, 525 U.S. 909, and *cert. denied*, 525 U.S. 1059 (1989), for example, dealt with a prisoner who was found to have ordered several violent crimes from his jail cell. Faced with convincing evidence that the prisoner was likely to order more crimes from prison, the Second Circuit approved an order prohibiting him from "corresponding with, and receiving visits from, anyone except his attorney and close family members approved by the district court with notice to the U.S. Attorney's office, and that correspondence and visits with everyone except his attorney be monitored." *Id.* at 107.[6] It is noteworthy that even in this extreme example, which did not involve a defendant in the midst of his trial, the law has gone to great lengths to prevent the government from acquiring the power to define the scope of the attorney's relationship to his client. The attorney, in fact, was the only person who did not require the approval of the district court to meet with the prisoner and was the only one who could communicate with him in private. *Id.*

The trial court in this case issued its gag order *sua sponte* immediately upon learning that the eyewitness was going to testify.[7] The trial court did not review any

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[6] Such restrictions were justified "upon a showing of probable cause." *Id.* at 109 (citing 18 U.S.C. § 3582(d), which allows district courts to limit the associational rights of defendants convicted of racketeering offenses).

[7] The trial court issued the order on the basis of statements made by the prosecution. Although the court began a *Sirois* hearing to determine whether or not Mr. Morgan had actually threatened the witness, that hearing was adjourned without any findings of fact. The Second Circuit stated that there was not "any impairment of the ability of Morgan – who was present at the *Sirois* hearing – to defend against the allegations that he and his associates had engaged in intimidation attempts." *Morgan*, 204 F.3d at 368. This is incorrect, however, because the *Sirois* hearing was adjourned during the presentation of the government's case and *before* the defense had the opportunity to present any evidence in response to the allegations of witness tampering.

alternatives before issuing the order, even though at least two alternatives which would have protected the witness, without depriving the defendant of his constitutional right of access to counsel, were available.

When confronted with what seemed to be a potential conflict between the defendant's right of access to his counsel and the need to prevent witness intimidation, the trial court should have considered alternatives to harmonize the two goals – before simply subordinating one to the other. By giving trial courts a mandate to make that choice without requiring a review of alternative measures, the Second Circuit's rule allows for "arbitrary and disproportionate" deprivations of counsel such as occurred in this case. *See Rock*, 483 U.S. at 45.

2. Irreconcilable Conflicts Between an Important Governmental Interest and the Constitution Must be Resolved in Favor of the Constitution.

If, upon a review of alternatives, a trial court finds that a conflict between the defendant's rights and the interests of trial administration can not be resolved, "the conflict must, under the Sixth Amendment, be resolved in favor of the right to the assistance and guidance of counsel." *Geders*, 425 U.S. at 91; *see generally Craig*, 497 U.S. at 860-70 (Scalia, J. dissenting) ("We are not free to conduct a cost-benefit analysis of clear and explicit constitutional guarantees, and then to adjust their meaning to comport with our findings.").[8]

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[8] *Illinois v. Allen*, 397 U.S. 337 (1970) and *Taylor v. Illinois*, 484 U.S. 400 (1988) are examples of cases where the Court allowed the defendant to be deprived of a constitutionally guaranteed right: the right to be present at trial in *Allen* and the right to call witnesses in *Taylor*. Those cases, however, did not determine that the defendant was not entitled to those rights but rather than he effectively waived them. The defendant in *Allen* lost his rights by engaging in obstreperous conduct in the courtroom. In *Taylor*, the defendant engaged in a pattern of discovery violations that seemed to be

In spite of the existence of the alternatives discussed above, to the extent that the trial court may have found itself in a position where it felt compelled to choose between either allowing the defendant to enjoy his right to counsel or accommodating the interests of the trial, the law is clear. The Constitution must prevail.

The Second Circuit's rule, which allows trial courts to deprive a criminal defendant of the assistance of counsel, does not enhance, but inhibits, the truth-seeking function of the trial. Both the constitutional rights of the defendant and important trial-administration concerns have the purpose of enhancing the integrity of the judicial process. Thus, when the Second Circuit sets the right and the interest in opposition it presents a paradox. As such, the Second Circuit's rule defeats, rather than advances, the Court's goal of maintaining the integrity of the judicial process. It is unconstitutional and should be reviewed by this Court.

II. THE DECISION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT IS IN CONFLICT WITH THE DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS.

Every Court of Appeals to examine the issues raised here is sharply divided with the Second Circuit. To the extent that any circuit has faced a conflict between the defendant's constitutional rights and important government interests, it has harmonized the two without violating *Perry*'s rule of unrestricted access to counsel during a long recess. No circuit has made it permissible for a trial court to deprive a defendant of this fundamen-

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designed to conceal a plan to present fabricated testimony. Exclusion of the tainted evidence was therefore appropriate and did not violate the Sixth Amendment's Compulsory Process Clause. There is no authority supporting the view that a sufficiently compelling trial interest can justify the deprivation, as opposed to a mere restriction, of a constitutional right.

tal right.

A. The District of Columbia Circuit

In *Mudd v. United States*, 798 F.2d 1509 (D.C. Cir. 1986), the District of Columbia Circuit held that an order instructing defense counsel not to speak with his client about the latter's testimony over a weekend recess deprived the defendant of his Sixth Amendment right to the effective assistance of counsel. *Mudd* involved a limited gag order, similar to the one imposed on Mr. Morgan, which prevented trial counsel from talking to the defendant about his testimony, but allowed them to talk "about other things." *Id.* at 1510.

On appeal, the District of Columbia Circuit relied upon *Geders* to hold that the gag order violated the defendant's right to counsel and reversed the conviction. The court viewed *Geders* as grounded in the understanding that restraints on *any* of the matters trial counsel and defendant are entitled to discuss violates the Sixth Amendment – regardless of whether or not the order is a blanket prohibition. *See id.* at 1511-12.

Mudd explained the dangers of a limited order, such as the one involved in Mr. Morgan's case, as follows:

> While the order in this case was indeed more limited than the one in *Geders*, the interference with Sixth Amendment rights was not significantly diminished. Even though Mudd was free to discuss strategy and tactics, there are obvious, legitimate reasons he may have needed to consult with counsel about his upcoming cross-examination. . . . [A]n order such as the one in this case can have a chilling effect on cautious attorneys, who might avoid giving advice on non-testimonial matters for fear of violating the court's directive. Consultation between lawyers and clients cannot be neatly divided into discussions about 'testimony' and those about 'other' matters.

Id. at 1512. According to the court, *Geders* made it clear that "courts may not balance the danger of altered testimony against the right to counsel." *Id.*

In *United States v. Eniola*, 893 F.2d 383 (D.C. Cir. 1990), the District of Columbia Circuit confronted a case very similar to this one. *Eniola* involved two co-defendants, Eniola and Bamji, who were on trial for drug-related offences arising out of an undercover police operation. During the trial, it was revealed at two bench conferences that a potential witness was a government informant. The trial court issued a protective order which barred both defense counsel from discussing with their respective clients not only the potential witness' ongoing status as a police informant, but also her past status and role as an informant at the time of the drug transaction. *See id.* at 385.

The government argued that a conflict existed between the right to effective assistance of counsel and the privilege of police informants to shield their identity and that the Sixth Amendment concerns raised should be overridden according to the balancing test found in *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957), which holds that "[w]hether a proper balance renders non-disclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors."

The District of Columbia Circuit rejected this argument, finding that the government's

> reasoning ignores the rationale underlying the Sixth Amendment right to effective assistance of counsel. Unlike the cases offered by the government, which focused on the relevancy of the informant's role and potential testimony, in this case the trial court's protective order did not preclude defendants from calling the witness. . . . Instead, *the protective order im-*

> *pinged directly on defense counsel's ability to confer with the client on a critical aspect of the defense.* As the First Circuit has observed, "utmost candor between an attorney and client is essential to effective assistance of counsel." Therefore, *the Sixth Amendment protects the defendant against intrusions that could inhibit the free exchange of information between attorney and client.* While we recognize that this Sixth Amendment value will not always trump the informant's privilege, where defense counsel has presented an arguable scenario for entrapment, his ability to pursue this course cannot be hemmed in by the privilege. As the *Mudd* court counseled, appellants need not show prejudice to establish a violation of the right to effective assistance of counsel.

Eniola, 893 F.2d at 387 (citations omitted) (emphasis added).

The court found that a balancing test such as *Roviaro* can not be applied to this context because the Sixth Amendment "either is or is not implicated." *Id.* at 388. "The essence of the Sixth Amendment threshold is whether defense counsel has demonstrated that the entrapment defense has legitimate potential such that he is entitled freely to discuss strategies with his client for attempting to prove the defense." *Id.*

The Court of Appeals found that one of the defendants, Eniola, could not present an arguable scenario for entrapment. As a result, it refused to find that his right to counsel encompassed discussions relating to the witness who was the subject of the gag order. *See id.* at 387. The court thus was able to reconcile Eniola's Sixth Amendment right to counsel with the government's interest in maintaining the informant's privilege. Although Eniola would normally have had the freedom to discuss any matter with his attorney, his need to receive advice in order to assure him a fair trial did not

encompass a discussion of the informant's testimony. It was therefore appropriate to restrict his access to counsel as he was *not* being deprived of his constitutional right.

With respect to the other defendant, Bamji, the Court of Appeals found that the Sixth Amendment threshold was breached because there was sufficient evidence in the record to present an arguable scenario for entrapment. *See id.* The Sixth Amendment, therefore, required that Bamji should not be inhibited from exploring the same matter with his attorney. His right to counsel, therefore, could *not* be reconciled with the gag order; consequently, the gag order violated his constitutional right to the assistance of counsel.

B. The Third Circuit

Bailey v. Redman, 657 F.2d 21 (3rd Cir.), *cert. denied*, 454 U.S. 1153 (1982), held that an order which prohibited a defendant from discussing his testimony with anyone during an overnight recess, a total of seventeen hours, constituted a *per se* violation of the defendant's Sixth Amendment rights. *See id.* at 23-24. The court, however, noted in its reading of *Geders* that defense counsel "argued vigorously at the time of imposition of the restriction that the trial court's instruction was improper and violated [his] clients' rights to consult with counsel." *Id.* at 24. n.4. Based upon this fact, the court required the defendant to show that he would have met with his counsel before concluding that he had been deprived of his right to consult with his attorney. In the absence of such evidence, the court did not grant relief.

Defense counsel in Mr. Morgan's case clearly objected to the gag order, stating first "Judge, it's not for me, Judge, to withhold this information from him" and later "He has already asked me what's gone on in chambers after I have related to him as fully as I can everything that's gone on and it may be a mistaken notion that he has the right to know and I have told him that." (Tr.

282-83). The distinction between *Bailey* and the Second Circuit's decision is that *Bailey* found that the defendant did not preserve his rights, while the decision below acknowledged that Mr. Morgan preserved his rights yet overrode them.

C. The Fourth Circuit

The Second Circuit's decision is also in conflict with the decision of the Fourth Circuit Court of Appeals in *United States v. Cobb*, 905 F.2d 784 (4th Cir. 1990), *cert. denied*, 488 U.S. 1049 (1991). *Cobb* involved a gag order issued during a defendant's cross-examination, which prevented the defendant from discussing his ongoing testimony with anyone, including his attorney, during a weekend recess. Applying *Geders*, *Perry*, and *Mudd*, the Fourth Circuit held that this order effectively denied Cobb of access to counsel:

> To remove from Cobb the ability to discuss with his attorney any aspect of his ongoing testimony effectively eviscerated his ability to discuss and plan trial strategy. To hold otherwise would defy reason. How can competent counsel not take into consideration the testimony of his client in deciding how to try the rest of the case?

Id. at 791. *Cobb* recognized the concerns of ensuring the veracity of testimony and protecting the integrity of an ongoing cross-examination. However, the court ruled that *Perry* stood for the proposition that these concerns at some point "must give way to the protections of the Sixth Amendment." *See id.* at 792. The court then quoted *Perry*: "It is the defendant's right of unrestricted access to his lawyer for advice on a variety of trial-related matters that is controlling in the context of a long recess." *Id.* (quoting *Perry*, 488 U.S. at 284.) The court also took note of *Mudd*'s reasoning about the chilling effect of even limited gag orders on cautious attorneys. *Id.* at 791.

Cobb found that the gag order imposed on the defendant clearly violated his Sixth Amendment right to counsel because it "effectively eviscerated his ability to discuss and plan trial strategy." *Id.* at 792. Although it recognized the importance of the fairness concerns behind the gag order, it adhered to *Perry*'s requirement of *unrestricted access* when Sixth Amendment protections come into play.

D. The Sixth Circuit

The Second Circuit's decision is also inconsistent with a decision of the Sixth Circuit Court of Appeals. *United States v. Bryant*, 545 F.2d 1035 (6th Cir. 1976) held that *Geders* applied to an hour-long luncheon recess when a party on trial would ordinarily be entitled to consult with his attorney. The Court of Appeals stated that:

> [A] defendant in a criminal trial often needs to consult with his attorney during trial about matters other than his own testimony. He is entitled to the advice of counsel *throughout* the trial. . .

Id. at 1036 (emphasis added).

E. The Seventh Circuit

Similarly, in *Sanders v. Lane*, 861 F.2d 1033 (7th Cir. 1988), the Seventh Circuit Court of Appeals held that any judicial order prohibiting conversations between an accused and his attorney during a trial recess violates the Sixth Amendment. The violation is found in the interference itself, and consequently, the court stated that "the defendant need not demonstrate prejudice." *Id.* at 1039. The gag order at issue in *Sanders* prohibited the defendant from consulting with his attorney during a one-hour lunch break during the course of the defendant's testimony. After the defendant testified, however, the court granted defense counsel a separate recess to discuss the matters he wanted to raise with his client at lunch. The court relied upon the fact that the

court granted a subsequent recess to find that the gag order issued during the lunch recess did not contaminate the proceeding and was harmless.

Most recently, in *United States v. Santos*, 201 F.3d 953 (7th Cir. 2000), the Seventh Circuit ruled that the trial court deprived defendant of her right to counsel when the trial judge forbade the defendant's lawyer from discussing during an overnight recess the substance of his client's testimony, but allowed conversation "regarding strategy, the calling of witnesses, and so on." *Id.* at 956. In the court's view, *Perry* made clear that "while the trial judge may instruct the lawyer not to coach his client," he must not prevent discussions of defendant's ongoing testimony during a substantial recess so as not to preclude assistance of counsel with respect to "legitimate legal and tactical questions." *Id.* The court found that the order deprived the accused of her Sixth Amendment right to effective assistance of counsel, even though the lawyer was free to confer with the defendant and discuss certain aspects of her testimony. *See id.* at 956-66.

F. The Ninth Circuit

In *United States v. Miguel*, 111 F.3d 666 (9th Cir. 1997), the Ninth Circuit found that the defendant's inability to communicate contemporaneously with his counsel during a videotaped deposition conducted outside the presence of the defendant "raised serious Sixth Amendment problems." *Id.* at 672. However, because the defendant, who was represented by two counsel, could have asked the non-questioning attorney to join him during the deposition, the court found no unlawful restriction on the defendant's access to counsel. *See id.* at 673. The Ninth Circuit explained that *Geders* and *Perry* demanded unrestrained access to counsel with respect to matters which the defendant has a constitutional right to discuss with his lawyer. *See id.* at 672. The court recognized that *Perry* was limited to situations in which the defendant is *not* entitled to

counsel's advice. *See id.* at 672 n.13. ("The result in *Perry* depended, however, on the fact that a defendant is not entitled to confer with counsel during the defendant's testimony.").

G. The Eleventh Circuit

As with the other six circuits discussed, the Eleventh Circuit's decision in *Crutchfield v. Wainwright*, 803 F.2d 1103 (11th Cir. 1986), *cert. denied*, 483 U.S. 1008 (1987), draws a clear line between restrictions on substantive attorney-client communication on matters related to the trial and restrictions which do not prevent the defense from discussing important trial matters. In *Crutchfield*, the trial judge admonished the defendant not to discuss his testimony with his attorneys during a two hour lunch break while he was on the stand. The Court of Appeals held that *any* deprivation of the assistance of counsel constitutes reversible error which necessitates a new trial. *See id.* at 1108. The court held, however, that a defendant must demonstrate deprivation of counsel by showing that he and his counsel actually desired to confer during the recess. Again, unlike in Mr. Morgan's case, the attorney here did not object to the gag order and, as a result, the court did not find a deprivation of counsel. *See id.* at 1110.

None of these circuits have adopted a rule which would allow the trial court to prohibit the defendant from speaking with his lawyer about a trial-related matter, such as the availability of the prosecution's only eyewitness, during an overnight recess, no matter how important the countervailing interest. The Second Circuit, however, has clearly split itself from its sister circuits by ruling that the constitutional right of access to counsel *can be deprived* in order to advance an important countervailing need. Given the importance of this matter and the need for guidance on such a fundamental issue of trial management, this Court should grant this petition for a writ of certiorari.

CONCLUSION

The rule adopted by the Second Circuit departs from the decisions of this Court and seven other circuits addressing the issue of how a trial court should respond to a potential conflict between a defendant's constitutional rights and an important governmental interest. This case presents a timely opportunity for this Court to review the Second Circuit's ruling and immediately reinstate the authority of this Court's decisions in *Geders v. United States*, 425 U.S. 88 (1976), and *Perry v. Leeke*, 488 U.S. 272 (1989), in the Second Circuit.

For the foregoing reasons, Darius Morgan respectfully requests that this Court grant a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit.

Dated: New York, New York
May 30, 2000

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1999

(Argued: October 20, 1999 Decided: February 28, 2000)

Docket No. 98-2686

DARIUS MORGAN,

Petitioner-Appellant,

– v.–

FLOYD BENNETT, Superintendent,
Elmira Correctional Facility,

Respondent-Appellee.

Before:

KEARSE, MINER, and LEVAL,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Eastern District of New York, Edward R. Korman, *Judge*, denying petition for habeas corpus alleging deprivation of rights to confer with counsel and to confront witnesses.

Affirmed in part, vacated in part, and remanded.

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*361 HARRY JHO, New Haven, Connecticut (Brett Dignam, The Jerome N. Frank Legal Services Organization, New Haven, Connecticut, on the brief), for *Petitioner-Appellant.*

CAMILLE O'HARA GILLESPIE, Assistant District Attorney, Brooklyn, New York (Charles J. Hynes, District Attorney for *362 Kings County, Roseann B. MacKechnie, Assistant District Attorney, Brooklyn, New York, on the brief), for *Respondent-Appellee.*

KEARSE, *Circuit Judge:*

Petitioner Darius Morgan, a New York State ("State") prisoner convicted of murder and attempted murder, appeals from a judgment of the United States District Court for the Eastern District of New York, Edward R. Korman, *Judge,* denying his petition pursuant to 28 U.S.C. § 2254 (1994 & Supp. II 1996) for a writ of habeas corpus alleging principally that his Sixth Amendment right to counsel was infringed when the trial court ordered his attorney not to disclose to him that a certain witness was to testify on the following day. Morgan also alleged, *inter alia,* that his Sixth Amendment right to confront the witness was abridged by other rulings of the trial court. The district court held that the trial court's instruction to Morgan's attorney was not impermissible and ruled that Morgan's confrontation claim was procedurally barred. Morgan challenges these rulings on appeal. For the reasons that follow, we reject his assistance-of-counsel claim, and we affirm the denial of his petition to the extent that it dismissed that claim. However, we conclude that his confrontation claim is not procedurally barred, and we vacate and remand for further proceedings with respect to that claim.

I. BACKGROUND

During the early morning hours of February 27, 1987, in an apartment in Brooklyn, New York, Denise Hill was shot and wounded; her friend Rachel Layne was shot and died shortly thereafter. Hill had known Morgan prior to these events, having bought drugs from him and having begun a sexual relationship with him. While hospitalized after the shooting, Hill selected Morgan's picture from a photographic array, identifying him as the shooter. Morgan was arrested and charged with murder and attempted murder. Hill was scheduled to testify at his trial.

Prior to trial, Morgan moved to suppress Hill's identification testimony. At a suppression hearing held on May 15, 1989, Hill described her relationship with Morgan and gave a more detailed account of the above events. The court denied the motion to suppress.

A. *The Events Preceding Hill's Testimony at Trial*

On May 30, 1989, after Morgan's trial had begun but before Hill testified, a court officer informed the court that Morgan had spoken to Hill outside of the courtroom, stating "You look good," and asking her, "Are you with me or what?" (Trial Transcript ("Tr.") 162-63.) Although Morgan's attorney stated that Morgan had merely nodded at Hill, the court admonished Morgan and warned him against further attempts at communication.

Later that day, Hill was called to testify. Shortly before she was to be brought into the courtroom, however, she stated that she would not take the witness stand, and she threatened to "take the fifth" unless she could speak with prosecutors. (Tr. 231-32.) Thereafter, in a conference conducted outside the presence of Morgan and the jury, the prosecutor informed the court that Hill was "terrified of testifying against" Morgan

and "feared for her family's safety and especially the safety of her daughter." (Tr. 233.) The prosecutor stated that, according to Hill (who was herself then incarcerated on an unrelated charge), two associates of Morgan, "Charles Brown," better known as "Chucky," and "Marty," had visited her in jail and said they knew that she was to be the principal witness at Morgan's trial. They stated that Morgan was "facing too much time" and "proceeded to ask her about her eight-year old daughter" in a *363 way that Hill found disturbing. (Tr. 234.) On other occasions, Marty had approached Hill's mother and sister in a threatening manner. (Tr. 235.)

The prosecutor requested that the proceedings be adjourned for the day so that she could prepare a motion for a "*Sirois* hearing," *i.e.*, a hearing to determine whether a witness's unavailability or unwillingness to testify was caused by misconduct on the part of the defendant, such that "the defendant will be deemed to have waived any objection to the admissibility of the witness' prior Grand Jury testimony and said testimony may be admitted as direct evidence at the defendant's trial." *Holtzman v. Hellenbrand*, 92 A.D.2d 405, 415, 460 N.Y.S.2d 591, 597 (2d Dep't 1983) (per curiam). Over Morgan's objection, the court granted the adjournment.

On the following morning, in a conference from which Morgan was excluded, the court notified counsel that it had been informed by a court officer that after the previous day's adjournment, Morgan had blown a kiss to Hill as he was being returned to his holding cell, and said, "I love you too. You don't have to worry about nothing. You took good care of it." (Tr. 249-50.) After the court officer was questioned, the prosecutor elaborated on the fears that had been expressed by Hill. According to Hill, Chucky and Marty had visited her in jail after she testified at the suppression hearing. They told her that if she testified at trial, they could not guarantee that nothing would happen to her family. They stated that they could, however, guarantee that

nothing would happen to her family if she did not testify.

Following a luncheon recess, the conference resumed and the prosecutor reported that Hill remained concerned for her safety but was wavering about whether or not to testify. The court decided to grant the motion for a *Sirois* hearing, and it instructed the prosecutor to have her other witnesses brought to court. After calling her office, the prosecutor informed the court that Hill had now indicated that although she "was still afraid . . . she would take the stand and testify." (Tr. 280.) Because the court had not yet obtained counsel to represent Hill in connection with the possible invocation of her Fifth Amendment privilege against self-incrimination, however, Hill could not be called to testify until the next day. The court decided to begin the *Sirois* hearing in case Hill changed her mind a third time and refused to testify. The court noted that if Hill testified the following morning, the hearing would be abandoned as unnecessary.

Before adjourning the conference and opening the *Sirois* hearing, the court instructed Morgan's counsel "not to discuss with your client . . . that Miss Hill may take the stand tomorrow once the jury is brought up and may testify in connection with the trial proper." (Tr. 284.) The court stated that the revived expectation that Hill would testify was "[t]he only thing I am directing you not to discuss with your client." (*Id.*) Although counsel objected and argued that the restriction was improper, he stated that he would comply.

The *Sirois* hearing was begun that afternoon, with Morgan present. One witness, a police detective, described in detail Hill's fears and the threats Hill had reported receiving from Morgan and his associates. As it turned out, however, the *Sirois* hearing was not completed because on the following morning, June 1, Hill testified.

B. *Hill's Testimony and the Proposed Impeachment Evidence*

To the extent pertinent here, Hill testified at trial that she had gone to the apartment on February 23, 1987, to buy drugs and had remained there through the early morning hours of February 27, when the shootings occurred. With her at the apartment were Morgan, Layne, and a man known to Hill as "Monk." In the wee hours of February 27, Hill, Layne, Monk, *364 and Monk's brother Randy were in the living room of the apartment smoking crack cocaine.

Between 6:00 and 6:30 a.m., Morgan briefly left the apartment, returning in a state of agitation because he could not find his car and asking what had happened to it. When no one could provide an answer, Morgan said, "Y'all don't tell me what happened to my car, I'm going to murder everybody in here." (Tr. 364.) He asked Monk and Randy, "If I murder, if I knock them off, would y'all tell on me?" (*Id.*) After Monk and Randy said they would not, Morgan pulled out a gun and shot Hill in the knee and back. He shot and wounded Layne, who vainly sought refuge in another room; she was pursued by Morgan who shot her repeatedly, inflicting wounds that proved to be fatal. Morgan then fled the apartment.

Hill testified that Monk then told her not to mention Morgan's involvement to anyone and to say that the shooting was drug-related. Hill obeyed this instruction when she was first interviewed after the shootings, stating that the crimes had been committed by unidentified persons who had entered the apartment. Only thereafter did she describe the events above and disclose that Morgan was the shooter.

In cross-examining Hill, defense counsel attempted to ask whether anyone had threatened Hill or forced her to testify. The court disallowed that line of questioning, expressing concern that it would raise "a hornet's nest

in connection with threats." (Tr. 476-77, 480.)

Defense counsel also informed the court that he wished to call a witness who would testify that the district attorney had forced Hill to testify. Thereafter, in a "preliminary offer of proof," counsel stated that Gladstone Smith, an inmate at Rikers Island, would testify that Hill had told her that Layne's stepmother was "forcing her to testify; that she didn't want to testify; and as a result of their forcing her, she was going on the stand, but she was not comfortable going on the stand because she was saying things that weren't true." (Tr. 523-24.) The court stated that it believed the issue would be "collateral" (Tr. 526); however, without ruling that Smith would be allowed to testify, it signed a subpoena so that defense counsel could bring Smith into court. On the following day, notwithstanding the subpoena, Smith was not produced in court, and defense counsel requested a continuance. The court concluded that the issue to which Morgan sought to have Smith testify—that Hill had been pressured to deliver fabricated testimony—was collateral and unsupported, and it therefore refused to grant a continuance. The defense rested without calling any witnesses.

The jury found Morgan guilty of murder in the second degree and attempted murder in the second degree. He was sentenced to 25-years-to-life imprisonment for the murder and 10-20 years for the attempted murder, to run consecutively to each other and to a prison term that he was then serving on an unrelated conviction. The Appellate Division affirmed Morgan's conviction, and leave to appeal to the New York Court of Appeals was denied. *See People v. Morgan*, 176 A.D.2d 359, 574 N.Y.S.2d 592 (2d Dep't 1991), *lv. denied*, 79 N.Y.2d 861, 580 N.Y.S.2d 733 (1992).

C. *The Present Proceeding*

Morgan filed his present petition for a writ of habeas corpus in 1996, asserting a variety of claims. Those

pertinent to this appeal are his contention that he was unconstitutionally deprived of unrestricted access to his attorney for a lengthy period, in violation of the principle established in *Geders v. United States*, 425 U.S. 80, 91 (1976), and his contention that his right to confront Hill was abridged by the restriction of his cross-examination of her and the exclusion of the impeaching testimony anticipated from Smith.

*365 In a Memorandum and Order dated May 27, 1998, the district court denied the petition. *See* 1998 WL 315135 (E.D.N.Y.). The court rejected Morgan's assistance-of-counsel claim on its merits. *See id.* at *5-7. Although the court stated that a complete ban on counsel-defendant communications for a lengthy period would have been unconstitutional, it noted that

> the prohibition in this case did not prevent defendant from conferring with his counsel "altogether." *Perry v. Leeke*, 488 U.S. 272, 280 (1989)], (citing *Strickland v. Washington*, 466 U.S. 668, 692, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Indeed, it did not preclude petitioner from seeking any advice or guidance from his lawyer, and his lawyer was free to discuss anything relating to the trial except the fact that Denise Hill was again likely to testify. This restriction was justified by the prior threats against Denise Hill.

1998 WL 315135, at *6. As discussed in greater detail in Part II.B. below, the district court ruled that Morgan's confrontation claim of impermissible preclusion of evidence as to the alleged pressures on Hill to testify was procedurally barred. *See id.* at *7-12.

The court denied the habeas petition in its entirety but granted a certificate of appealability with respect to the issues of (1) whether Morgan was unconstitutionally deprived of his right to confer with counsel, and (2) whether Morgan properly preserved his challenges to the trial court's exclusion of the proposed cross-examination of Hill and the impeachment testimony he proposed

to elicit from Smith. *See id.* at *12.

II. DISCUSSION

On appeal, Morgan pursues the assistance-of-counsel and confrontation claims as to which a certificate of appealability was granted. For the reasons that follow, we conclude that the assistance-of-counsel claim lacks merit and that the confrontation claim should not have been dismissed for lack of exhaustion.

A. *The Prohibition Against Counsel's Informing Morgan that Hill Was Again Scheduled To Testify*

A defendant in a criminal trial is guaranteed not just the right to be represented by counsel but the right to the effective assistance of counsel. *See, e.g., United States v. Cronic*, 466 U.S. 648, 654 (1984); *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984). Accordingly, the court may not properly restrict the attorney's ability to advise the defendant unless the defendant's right to receive such advice is outweighed by some other important interest.

In *Geders v. United States*, 425 U.S. 80 (1976), and *Perry v. Leeke*, 488 U.S. 272 (1989), the Supreme Court considered Sixth Amendment claims of interference with the right to effective assistance of counsel in the context of instructions that a defendant and his attorney not confer during a recess that interrupted the defendant's trial testimony. In *Geders*, the interruption occurred when the trial was adjourned for the day, and the prohibition thus covered an approximately 17-hour period through the resumption of trial on the following day; in *Perry*, the recess took place during the trial day and was of 15 minutes' duration.

In both cases, the Supreme Court noted that most witnesses may be ordered not to confer with counsel

during an interval in which their trial testimony is interrupted. As the *Geders* Court observed, the purposes of such an order are principally to

> exercise[ ] a restraint on witnesses "tailoring" their testimony to that of earlier witnesses; . . . [to] aid [ ] in detecting testimony that is less than candid . . . . [and to] prevent[ ] improper attempts to influence the testimony in light of the testimony already given.

*366 425 U.S. at 87. As the *Perry* Court elaborated,

> it is entirely appropriate for a trial judge to decide, after listening to the direct examination of any witness, whether the defendant or a nondefendant, that cross-examination is more likely to elicit truthful responses if it goes forward without allowing the witness an opportunity to consult with third parties, including his or her lawyer.

488 U.S. at 282.

In light of an accused's Sixth Amendment right to counsel, however, that method of forestalling the coaching or tailoring of testimony is limited when the witness is the defendant in a criminal proceeding. In *Geders*, the Court concluded that an order "prevent[ing the defendant] from consulting his attorney during a 17-hour overnight recess, when an accused would normally confer with counsel," was too great a restriction in light of the interest that the trial court sought to protect. 425 U.S. at 91. The Court noted that "[t]here are other ways to deal with the problem of possible improper influence on testimony or 'coaching' of a witness short of putting a barrier between client and counsel for so long a period as 17 hours." *Id.* at 89. The trial court could in many instances, for example, eliminate the recess or prolong the day's session and require that the testimony continue without interruption. Or, the prosecutor could, within appropriate limits,

> cross-examine a defendant as to the extent of any

> "coaching" during a recess. . . . Skillful cross-examination could develop a record which the prosecutor in closing argument might well exploit by raising questions as to the defendant's credibility, if it developed that defense counsel had in fact coached the witness as to how to respond on the remaining direct examination and on cross-examination.

Id. at 89-90. The *Geders* Court concluded that in light of the other methods for countering the possibility of coaching, the lengthy overnight ban imposed on communications between Geders and his attorney was impermissible:

> To the extent that conflict remains between the defendant's right to consult with his attorney during a long overnight recess in the trial, and the prosecutor's desire to cross-examine the defendant without the intervention of counsel, with the risk of improper "coaching," the conflict must, under the Sixth Amendment, be resolved in favor of the right to the assistance and guidance of counsel. . . .
>
> . . . . We hold that an order preventing petitioner from consulting his counsel "about anything" during a 17-hour overnight recess between his direct- and cross-examination impinged upon his right to the assistance of counsel guaranteed by the Sixth Amendment.

Id. at 91. The *Geders* Court noted that it did not need to, and did not, deal with limitations imposed in other circumstances.

In *Perry*, the Court concluded that the trial court's order that the defendant not consult with his attorney during a 15-minute recess was permissible:

> [T]he Federal Constitution does not compel every trial judge to allow the defendant to consult with his lawyer while his testimony is in progress if the judge decides that there is a good reason to inter-

rupt the trial for a few minutes.

488 U.S. at 284-85. The Court distinguished *Geders* on the basis that a long, overnight recess such as was at issue there would normally be used for discussion of a number of other important matters, and a ban during such a period, covering communication on all topics, was too severe a restriction:

> [T]he normal consultation between attorney and client that occurs during an overnight recess would encompass matters that go beyond the content of the *367 defendant's own testimony—matters that the defendant does have a constitutional right to discuss with his lawyer, such as the availability of other witnesses, trial tactics, or even the possibility of negotiating a plea bargain. It is the defendant's right to unrestricted access to his lawyer for advice on a variety of trial-related matters that is controlling in the context of a long recess. See *Geders v. United States*, 425 U.S. at 88. The fact that such discussions will inevitably include some consideration of the defendant's ongoing testimony does not compromise that basic right.

488 U.S. at 284. The *Perry* Court concluded that, in contrast, "in a short recess in which it is appropriate to presume that nothing but the testimony will be discussed, the testifying defendant does not have a constitutional right to advice." *Id.* The Court also noted that, "[a]lternatively, the judge may permit consultation between counsel and defendant during such a recess, but forbid discussion of ongoing testimony." *Id.* n.8.

We conclude that *Geders* and *Perry* stand for the principle that the court should not, absent an important need to protect a countervailing interest, restrict the defendant's ability to consult with his attorney, but that when such a need is present and is difficult to fulfill in other ways, a carefully tailored, limited restriction on the defendant's right to consult counsel is permissible.

In the present case, the problem addressed by the state trial court's limited gag order was far more troubling than the possibility of witness coaching involved in *Geders* and *Perry*, for intimidation of witnesses raises concerns for both the well-being of the witness and her family and the integrity of the judicial process. Such safety concerns have been held to justify a number of other types of intrusions on a defendant's normal access to information. For example, the court may properly allow the government to withhold the identity of persons who have furnished information of criminal activities to law enforcement officials where there is a legitimate concern for the safety of the informant. *See, e.g., Roviaro v. United States*, 353 U.S. 53, 59-62 (1957); *United States v. Napolitano*, 761 F.2d 135, 139 (2d Cir.), *cert. denied*, 474 U.S. 842 (1985). Or, on a similar showing of concern for a witness's safety, the witness's address, generally an appropriate subject of defense inquiry, *see, e.g., Smith v. Illinois*, 390 U.S. 129, 131 (1968), may properly be withheld, *see, e.g., United States v. Cavallaro*, 553 F.2d 300, 304 (2d Cir. 1977). For similar reasons, the trial court may sometimes empanel an anonymous jury. *See, e.g., United States v. Thai*, 29 F.3d 785, 800-01 (2d Cir.) (anonymous jury justified by evidence of the defendants' acts of intimidation toward their crime victims, their attempts to kill certain of those victims, the murder of one robbery victim because of his refusal to retreat from his complaints to the police, and the fact that many members of the defendants' gang remained at large), *cert. denied*, 513 U.S. 977 (1994).

Nor is the interest in the integrity of the judicial process so easily protected when the danger is that the defendant will so intimidate the witness that she either decides to give testimony that is false, incomplete, or misleading, or refuses to testify at all. If the defendant's intimidation causes the witness to give false or misleading testimony, cross-examination may or may not bring out the truth. But in either event the record will contain false evidence whose effect may be to produce an unjust

decision.

If the defendant's intimidation causes the witness not to testify, the loss of her testimony may, to a degree, be offset by the introduction of the witness's prior grand jury testimony, *see, e.g., United States v. Mastrangelo*, 693 F.2d 269, 272-73 (2d Cir. 1982), or of hearsay evidence *368 from a law enforcement officer or a prosecutor as to the witness's prior unsworn statements, *see, e.g., United States v. Aguiar*, 975 F.2d 45, 46-47 (2d Cir. 1992). However, the admission of such prior statements may well be an inadequate substitute for the witness's live testimony, and we consider it well within the proper bounds of the trial court's discretion to attempt instead to forestall the witness intimidation. Most recently, in *United States v. Padilla*, 2000 WL 135071 (2d Cir. Feb. 7, 2000), at *2-4, this Court has upheld a district court's order temporarily barring counsel from informing their clients of the existence of an ongoing investigation into allegations of witness and jury tampering. *See also id.* at *2 (investigation was revealed to the defendants when it became relevant to their witness-selection decisions and to the nature of the cross-examination that could be expected if the defendants themselves were to testify).

We conclude that valid concerns for the safety of witnesses and their families and for the integrity of the judicial process may justify a limited restriction on a defendant's access to information known to his attorney.

In the present case, the record included evidence that Hill had complained to the prosecutor or to law enforcement agents that associates of Morgan visited her in mid-May following her suppression hearing testimony and indicated that her family would be harmed if she testified against Morgan at trial; that on May 30, the day Hill was first scheduled to testify, Morgan had asked her, "Are you with me or what?" (Tr. 162); and that later that day, after Hill initially declined to testify, Morgan told her, "You don't have to worry about noth-

ing. You took good care of it" (Tr. 249-50). The evidence was ample to cause concern that Morgan had engaged in, and was continuing to engage in, attempts to intimidate Hill into not testifying.

The restriction imposed on Morgan to alleviate that concern was substantively quite limited. Though the nondisclosure order covered an overnight recess, it dealt with a single fact: that Hill, after her second change of heart, was expected to testify the following day. There was no blanket prohibition against communication between Morgan and his attorney; there was no restriction on their ability to discuss any other facet of the case. It does not seem likely that the order would have caused any impairment of defense counsel's preparation for Hill's testimony. Hill had been called to testify on May 30, and presumably defense counsel had been prepared to cross-examine her that day. Nor was there any impairment of the ability of Morgan—who was present at the *Sirois* hearing—to defend against the allegations that he and his associates had engaged in intimidation attempts. The only restriction imposed was that counsel not inform him that those attempts would apparently be unsuccessful.

We do not see that other types of restrictions would have sufficed in the circumstances of this case. Morgan's messengers remained at large, and the whereabouts of Hill and her family were obviously known to them. There was no possibility of simply continuing with the trial without a recess until Hill could testify, for Hill required representation of counsel with respect to the potential invocation of her privilege against self-incrimination, and the court had not yet succeeded in obtaining counsel for her.

Given the evidence of threats to and intimidation of Hill by Morgan and his associates, and the circumstances of the case, we conclude that the trial court's order that counsel simply not inform Morgan that Hill had decided to testify after all was not an unreasonable

application of the principle established in *Geders* and *Perry*. Accordingly, we affirm the district court's rejection of Morgan's assistance-of-counsel claim.

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B. *Exhaustion of the Confrontation Claim*

With respect to Morgan's contention that his confrontation right was violated by the trial court's precluding him from calling Smith as a witness and from cross-examining Hill as to whether her inculpating testimony was the product of threats and coercion, we disagree with the district court's view that that claim had not been exhausted.

The exhaustion requirement imposed by 28 U.S.C. § 2254(b)(1) means generally that before seeking a writ of habeas corpus in federal court, a state prisoner must first have presented his claim to the highest court of the state. *See, e.g., Grey v. Hoke*, 933 F.2d 117, 119 (2d Cir. 1991); *Pesina v. Johnson*, 913 F.2d 53, 54 (2d Cir. 1990) (per curiam). In New York, a defendant who has appealed his conviction to the Supreme Court's Appellate Division may seek review of his conviction by applying to the Court of Appeals for a certificate granting leave to appeal. *See* N.Y.Crim. Proc. Law § 460.20 (McKinney 1994). Under court rules, the initial application is to be sent to the Chief Judge, who then assigns the application to a particular judge. *See* N.Y. Ct. Rules § 500.10 (McKinney 1999). The Clerk of Court thereafter informs the defendant or his attorney which judge has been assigned the application; supplemental arguments, if any, are usually sent directly to the judge so designated.

In order to exhaust his claim before the state's highest court, a defendant must give that court a fair opportunity to pass on his federal claim. *See, e.g., Picard v. Connor*, 404 U.S. 270, 275 (1971); *Wilwording v. Swenson*, 404 U.S. 249, 250 (1971) (per curiam); *Grey v. Hoke*, 933 F.2d at 119; *Daye v. Attorney General*, 696

F.2d 186, 190-92 (2d Cir.1982) (en banc). In *Grey v. Hoke*, we considered a petitioner who had sent the Court of Appeals a letter requesting leave to appeal; his letter mentioned only one claim, and it attached his Appellate Division brief which had argued that claim along with two others. We held that the submission was insufficient to inform the Court of Appeals that leave was being sought with respect to claims other than the sole claim mentioned in the letter.

> The fair import of petitioner's submission to the Court of Appeals . . . was that the other two [claims] had been abandoned. The only possible indication that the other two claims were being pressed was the inclusion of a lengthy brief originally submitted to another court. This did not fairly apprise the court of the two claims. We decline to presume that the New York Court of Appeals has "a duty to look for a needle in a paper haystack."

933 F.2d at 120 (quoting *Mele v. Fitchburg District Court*, 850 F.2d 817, 822 (1st Cir.1988)).

In the present case, Morgan appealed his conviction to the Appellate Division, asserting contentions in a brief filed by his new counsel, Rosali Vazquez of the Legal Aid Society, and in a supplemental brief filed *pro se*. The *pro se* brief included the contentions that the trial court had improperly precluded Morgan from impeaching Hill with questions as to whether the prosecution was forcing her to testify untruthfully and improperly refused to allow him to present the testimony of Smith. After the Appellate Division affirmed, Morgan sought leave to appeal to the New York Court of Appeals, in a letter from his attorney to the Chief Judge. After briefly describing the judgment of conviction and the Appellate Division's affirmance, the letter concluded as follows:

> I am enclosing copies of the briefs filed in the Appellate Division and that Court's order and

> opinion. Please advise me of the judge designated to decide this application so that I may send that judge a follow-up letter in support of the application. We request this Court to consider and review *all issues* *370 *outlined in defendant-appellant's* brief and *pro se supplemental brief.*

(Letter from Rosali Vazquez to Chief Judge Sol Wachtler, dated October 10, 1991 ("Vazquez's October 10 Letter"), at 1-2 (emphasis added).)

Thereafter, Vazquez was informed in a letter from the Clerk of the New York Court of Appeals that Morgan's case had been assigned to Associate Judge Stewart F. Hancock, Jr. The letter continued:

> Any papers to be relied on in furtherance of your application, such as supplemental arguments or a request for an oral hearing, should be in letter form sent directly to the Judge named above unless they have already been forwarded with the application.

(Letter from Donald M. Sheraw, Clerk of the New York Court of Appeals, to Rosali Vazquez, dated October 17, 1991 ("Court Clerk's Letter").) After receiving the Court Clerk's Letter, Vazquez sent Judge Hancock a follow-up letter, which began by stating that "[t]he question presented by this case is whether the court deprived appellant of his right to counsel when it prevented counsel from communicating with appellant overnight regarding the complaining witness's decision to testify." (Letter from Rosali Vazquez to Judge Stewart F. Hancock, Jr., November 7, 1991 ("Vazquez's November 7 Letter"), at 1). After discussing that issue, Vazquez stated that she

> would also like to draw your Honor's attention to Point I G in appellant's supplemental *pro se* brief [which concerned Morgan's alleged right to be present at the questioning of the second court officer who reported comments by Morgan to Hill]. After appellant filed his *pro se* brief, this Court

> ruled in *People v. Turaine*, 78 N.Y.2d 871 (1991), that a defendant had a right to be present at a hearing to elicit facts surrounding alleged intimidation so that the court could determine its admissibility at trial. It is appellant's contention that *Turaine* mandates that he be given a new trial.

(Vazquez's November 7 Letter at 2.)

The State opposed Morgan's request for leave to appeal, arguing, *inter alia*, that "[t]he Appellate Division also properly concluded that . . . the claims raised in [Morgan's] *pro se* supplemental brief did not warrant reversal." The Court of Appeals denied leave to appeal without comment. *See* 79 N.Y.2d 861, 580 N.Y.S.2d 733 (1992).

In addressing the confrontation claim asserted in Morgan's habeas petition, the district court, relying in part on *Grey v. Hoke*, concluded that the claim had been procedurally forfeited in light of Vazquez's November 7 Letter, ruling that the claim had not been fairly presented to the Court of Appeals. The district court stated:

> If there had not been a follow-up letter, this leave application could have arguably been sufficient to alert the Court of Appeals to the fact that petitioner sought leave with respect to each of the issues raised in the *pro se* supplemental brief. *See Meatley v. Artuz*, 886 F. Supp. 1009, 1013-14 (E.D.N.Y.1995) (holding that leave application which did not refer to any specific claim, but attached Appellate Division brief, "fairly presented" claims raised in Appellate Division to Court of Appeals). The November 7, 1991 letter, however, specifically addressed only two of petitioner's claims in a way that clearly suggested that these were the only issues on which leave was sought.

1998 WL 315135, at *8.

We disagree for several reasons. First, the present case differs significantly from *Grey v. Hoke*, in which the

request for leave to appeal was made in a letter that mentioned one issue but did not mention two others as to which habeas relief was eventually sought. In the present case, in contrast, Morgan's initial letter to the Court of Appeals expressly "request[ed] this Court to consider and review *371 all issues outlined in defendant-appellant's brief and *pro se* supplemental brief" submitted to the Appellate Division. (Vazquez's October 10 Letter at 2.) That statement was sufficiently specific to alert the Court of Appeals that Morgan sought review of all of the issues raised in his *pro se* supplemental Appellate Division brief.

Second, we do not think it appropriate to infer that the New York Court of Appeals would construe counsel's second letter as eliminating issues as to which review had been expressly requested. The reference in the Court Clerk's Letter to "supplemental" arguments appears to indicate that follow-up letters would be considered in addition to, not in lieu of or as a limitation on, the issues raised in counsel's initial letter.

Finally, we think the substance of the second letter's reference to Point I G of the *pro se* brief made clear that that reference was meant simply as a supplement. In referring to that point, the letter simply called the Court's attention to a case that had been decided by the Court of Appeals "[a]fter appellant filed his *pro se* brief" (Vazquez's November 7 Letter at 2), and stated it was Morgan's contention that reversal was required by that new case.

Because counsel's initial letter expressly sought review of "all issues outlined in defendant-appellant's... *pro se* supplemental brief" (Vazquez's October 10 Letter at 2), we conclude that Morgan fairly presented to the Court of Appeals the present confrontation claim, which was argued in his *pro se* supplemental brief, and thus satisfied the exhaustion requirement.

Whether the limitations that were imposed on the proposed cross-examination and impeachment of Hill

infringed Morgan's right to confront his accuser is a matter that goes to the merits. The district court described this claim as "not without merit," 1998 WL 315135, at *4, although it "believe[d] that the line of questioning precluded by the trial judge would have been a disaster for petitioner," *id.* at *12. The court declined, however, to "reach any final conclusion because a hearing may be required to at least determine what Denise Hill, if not Gladstone Smith, would have said if questioned." *Id.*

We are skeptical, for two reasons, of the need for further exploration as to Gladstone Smith. First, although admissible evidence as to whether Hill's testimony was fabricated would have been central to an assessment of her credibility, much of Smith's testimony as described in Morgan's offer of proof would have been collateral. Second, it is questionable whether any of Smith's testimony would have been admissible since there was no suggestion that she had any personal knowledge of the facts, and her testimony as to what Hill had told her would appear to be hearsay. In the circumstances, the trial court's denial of the continuance necessary to bring Smith to court seems well within the bounds of discretion.

We are also skeptical as to whether habeas could properly be granted on the confrontation claim with respect to the cross-examination of Hill. Hill herself, of course, could have been questioned as to the truth of her testimony; we cannot agree with the trial court's view that that issue was "collateral" (Tr. 526). However, it is hardly clear from the transcript pages cited to us by Morgan that the trial court was adequately apprised that the issue on which he wished to confront Hill was the truth or falsity of her testimony. Defense counsel asked Hill whether anyone had threatened or forced her to testify; but pressure merely to testify does not indicate pressure to falsify. Standing alone, therefore, defense counsel's question would not have elicited probative information; and it would surely, as the trial

court indicated, have opened the door to devastating questioning by the prosecution as to threats by Morgan to prevent Hill from testifying. We leave it to the district court, in the first instance, to determine (a) whether defense counsel adequately alerted the trial court that the ultimate issue he *372 sought to probe in this line of questioning was the truthfulness or falsity of Hill's testimony (assuming that was his intention), (b) if so, whether the limitation on the cross-examination of Hill improperly abridged Morgan's right to test the truthfulness of Hill's testimony and to bring out her biases and motivation for her testimony, *see generally Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986); *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974), and (c) if there was any constitutional error, whether it was harmless.

CONCLUSION

For the reasons stated above, the judgment of the district court is affirmed to the extent that it dismissed petitioner's claim that he was deprived of his right to the assistance of counsel, and is vacated to the extent that it dismissed the confrontation claim for lack of exhaustion. We remand for consideration of the confrontation claim on the merits.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

No. CV-96-4106 (ERK)

May 27, 1998

DARIUS MORGAN,

Defendant-Petitioner,

–v.–

FLOYD BENNETT,

Respondent.

Sharon Weintraub Dashow, George Sheinberg,
Brooklyn, NY, for plaintiff.

Charles J. Hynes, District Attorney for Kings County,
Brooklyn, New York, by Roseann B. MacKechnie,
Amy Appelbaum, Camille O'Hara Gillespie,
Asst. District Attorneys, for defendant.

MEMORANDUM AND ORDER

KORMAN, J.

*1 Petitioner, Darius Morgan, seeks a writ of habeas corpus, challenging his conviction for murder in the second degree and attempted murder in the second degree. The conviction arose out of a shooting that took

place on February 27, 1987 inside apartment 11-H at 9 Monument Walk in Brooklyn. At the time, petitioner was present along with four others, Denise Hill, Rachel Layne, and two brothers identified only as "Monk" and "Randy." At about 6:30 a.m., irate after he discovered that his car was missing, petitioner drew a gun and asked "Monk" and "Randy" whether they would implicate him if he shot the two women. When the men answered in the negative, petitioner shot Denise Hill in the knee and back, and then chased Rachel Layne into a bedroom where he shot her three times, killing her. Petitioner then fled the apartment in which his presence had been confirmed by forensic evidence. Tr. 631.

In response to instructions from "Monk", Denise Hill initially told the police that the apartment was a drug house, she had left the door unlocked, and that two unidentified males entered in an attempted drug robbery and just "started shooting." (Tr. 378, 380, 569). Only about fifteen minutes later, however, while Hill was still lying in a hospital bed, she told Detective Montemarano of the New York Police Department the same narrative of the shooting related above and to which she ultimately testified at trial. (Tr. 381, 570-72). At the trial, Detective Montemarano described Denise Hill's bedside statement as follows:

> THE WITNESS: She stated that while she was in the apartment, she was there with the deceased and three other males; that at approximately—I really don't recall the time, I think it was about 2:00 in the morning, 2:00 A.M., that an argument ensued; it was the males, they were arguing. She said that the individual known to me as Shareef [petitioner] left the apartment, and I believe she stated went to his mother's apartment. Although she couldn't see this, this is what she heard; she heard banging on the mother's door. Apparently was unable to gain entry. She then heard the elevator go down.

Still later, Shareef came back to the apartment. As far as the times are concerned, right now I'm not really 100 percent sure. I think it was maybe 4:00.

* * *

Okay. Originally she stated it was 6:00 o'clock in the morning that he first left the apartment. It was shortly thereafter that he returned. He approached the other two individuals that were in the apartment—they were both brothers, I really don't recall their names at the time—had a conversation with [them] and he had asked them if it would be all right if he wasted the girls. They had no objections. He walked into what would be called, I guess, the living room. The two girls were on the couch. He removed a revolver, fired at the witness first, striking her twice. The deceased got off the couch screaming, ran to another room and there were numerous shots that were fired.

*2 He, in turn, was directed by the two brothers to leave the apartment and they stated they would take care of this and he left.
(Tr. 571-73).

Over two years elapsed between the shooting and the trial. When called to the stand initially, Denise Hill unexpectedly refused to testify. She told the prosecutor that she was "terrified of testifying against the defendant" and that she "feared for her family's safety and especially the safety of her daughter." (Tr. 233). According to the Assistant District Attorney, Hill told her that two weeks earlier, two of petitioner's associates had visited her in jail, including one known as "Chucky," and told her that they knew she was the main witness in the case, and that petitioner "was facing too much time." (Tr. 234). The men asked about Hill's eight-year-old daughter and off-handedly referred

> to the safety of her family and daughter. The prosecutor told the judge that one of these men had made several overtures to Hill's family members, including her mother and her sister. (Tr. 235). To enable the prosecutor to meet with Denise Hill the following day—presumably to convince her to testify—the judge signed an order directing that Denise Hill be brought to the District Attorney's office.[1] (Tr. 242, 247). Before adjourning for the day the judge warned petitioner—whom she had already admonished for having improper contact with Denise Hill earlier in the day (Tr. 161-62)—not to speak with Hill at all. (Tr. 243).

Despite the judge's order, petitioner spoke with Denise Hill in the pens and on the way to Rikers Island that very evening. Their exchanges form the basis for two of the claims raised by petitioner, namely, his claims that he was excluded from a material stage of the trial and that he was deprived of the effective assistance of counsel. Thus, on May 31, almost immediately after Denise Hill first refused to testify, petitioner blew several kisses towards Ms. Hill and had several words with her in the presence of Court Officer DeBenedictus. The following morning, the judge called both attorneys and Officer DeBenedictus, into chambers. Petitioner was not present. The judge then observed that she had already admonished petitioner not to speak with Hill, and continued:

> THE COURT: In spite of that admonition, last night when we recessed at about 4:55, Officer DeBenedictus brought the defendant back to the pen and once again he saw Ms. Hill. And the first thing he did, he threw three—how many kisses?

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[1] At the time of trial, Denise Hill was incarcerated, apparently as a result of a 1987 armed robbery conviction in New Jersey. (Tr. 345, 449). She was being held at Rikers Island during the course of trial, and was transported to and from the "pens" at the courthouse, where her encounters with petitioner occurred.

OFFICER DEBENEDICTUS: *Just one. Well,* he had his mouth like (indicating).

THE COURT: He puckered and he kissed at least once and then made the following statement addressing Ms. Hill: "I love you too. You don't have to worry about nothing. You took good care of it." And that was the only conversation by the defendant. Was there any response by Ms. Hill?

OFFICER DEBENEDICTUS: I wasn't looking at her.

THE COURT: Did you hear her?

OFFICER DEBENEDICTUS: No. She was 20 feet away.

*3 THE COURT: Did the defendant speak in a voice loud enough to be heard?

OFFICER DEBENEDICTUS: Yes. (Tr. 249-50).

Although defense counsel complained that petitioner was not present, the trial judge then heard legal argument from the prosecutor regarding Denise Hill's decision whether or not to testify. The judge indicated that petitioner's presence was not required because the proceeding was legal argument, rather than an evidentiary hearing.

The same afternoon, the prosecutor informed the judge that Denise Hill "was still afraid to testify but that she would take the stand and testify." (Tr. 280). Nevertheless, for reasons that are unclear, the judge determined to go forward with a *Sirois* hearing. The purpose of such a hearing is to determine whether a defendant's misconduct is responsible for a witness' unavailability or unwillingness to testify, thus providing a basis for the admission of hearsay testimony of that witness. *See Matter of Holtzman v. Hellenbrand*, 460 N.Y.S.2d 591, 92 A.D.2d 405 (2d Dept.1983). The hearing was held later that day.

At the *Sirois* hearing, the sole witness was Detective Catherine Latawiek, who had spoken with Denise Hill several times, most recently that same morning. (Tr. 292). Detective Latawiek testified at length as to threats made to Denise Hill and her family.[2] She testified that two of petitioner's associates had paid an unexpected visit to Denise Hill in prison two weeks earlier, and had told Hill that petitioner was facing "too much time." The men said that if she testified, they could not guarantee the safety of her family. Detective Latawiek also testified that Denise Hill told her that petitioner had kissed her in the holding cell the previous evening and asked her if Chucky (one of the prison visitors) had given her any money. He also told Hill that he didn't mean to shoot her, because if he did, he would have shot her in the head. (Tr. 300). Later that same evening, on the bus returning to Rikers Island, Hill had asked petitioner whether her family would also be killed if she testified. (Tr. 301). Petitioner did not respond to this question. Finally, Detective Latawiek testified about several incidents related to her by Denise Hill in which Hill's mother and sister were approached by associates of petitioner. Defense counsel then had a full opportunity to cross-examine Detective Latawiek.

No other witnesses testified at the *Sirois* hearing. The judge did not rule on the application to admit Denise Hill's prior statements in lieu of her testimony, because the following morning Denise Hill agreed to testify. (Tr. 330, 344-486). Hill implicated petitioner on direct examination, and was cross-examined at length by defense counsel (the cross-examination fills over ninety pages of the record). Ultimately, the jury found petitioner guilty of murder in the second degree and attempted murder in the second degree. He was sentenced to twenty-five years to life for the murder and ten to

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[2] Normal rules of evidence do not apply in a *Sirois* hearing. *See People v. Geraci*, 85 N.Y.2d 359, 369 n. 4, 625 N.Y.S.2d 469, 475 n. 4, 649 N.E.2d 817 (1995).

twenty years for the attempted murder.

*4 On appeal, the Legal Aid Society filed a brief on his behalf raising two claims. In addition, petitioner filed a *pro se* supplemental brief, in which he raised, *inter alia*, the claim that the trial judge impeded the defense and denied petitioner a fair trial by limiting the cross-examination of Denise Hill, the sole eyewitness testifying in the case, and by denying the defense application to call a witness, Gladstone Smith, who would testify that Hill had been pressured to testify against petitioner. On September 30, 1991, the Appellate Division affirmed the conviction. *People v. Morgan*, 176 A.D.2d 359, 574 N.Y.S.2d 592 (2d Dept.1991). Leave to appeal the Court of Appeals was denied by Judge Hancock. *People v. Morgan*, 79 N.Y.2d 861, 580 N.Y.S.2d 733, 588 N.E.2d 768 (1992).

In a Memorandum and Order filed on September 12, 1997, I suggested that only one of the claims raised in petitioner's supplemental brief was properly preserved for review. This was the claim relating to his absence from the brief proceeding in chambers that preceded the *Sirois* hearing. The other arguments were not adequately raised in the petitioner's application for leave to appeal to the Court of Appeals. Nevertheless, only one of those had any arguable merit.[3] This was petitioner's claim that the trial judge impeded the defense and denied petitioner a fair trial by limiting the cross-examination of Denise Hill and denying the defense request to call Gladstone Smith as a witness. I then set the matter down for a further discussion of that issue. The resulting discussion served to clarify my understanding of the record.

In the present Memorandum and Order, I specifically

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[3] These arguments, which were raised in Points I, II, VI and VIII of Petitioner's brief here, are without merit for the reasons sufficiently detailed in the District Attorney's brief in the Appellate Division. The argument raised in Point VII relating to the use of Denise Hill's prior testimony is addressed infra at page 23 n.7.

address the two claims that were properly preserved, as well as the sole colorable unpreserved claim raised in the supplemental brief. I conclude that the two properly preserved claim are without merit and do not warrant habeas corpus relief. While the single colorable claim in the supplemental brief is not without merit, I adhere to my initial suggestion that this issue was procedurally forfeited.

DISCUSSION

I. THE PRESERVED ISSUES

A. *Exclusion from Proceedings*

Petitioner claims that his exclusion from the brief proceeding at which Officer DeBenedictus was questioned violated his right to be present at all material stages of the trial. *See Rushen v. Spain*, 464 U.S. 114, 117-18 (1983). This claim fails because the proceeding was immaterial, and because petitioner can show no prejudice resulting from his exclusion from it. The brief questioning of Officer DeBenedictus had no bearing on the trial itself. The trial judge specifically ruled that the questioning was merely a part of the prosecutor's application for a *Sirois* hearing and that nothing said there would affect the outcome of the *Sirois* hearing. More significantly, because the *Sirois* hearing never resulted in any ruling, much less one that affected the trial, and because Denise Hill ultimately testified at trial, the proceedings in chambers were not material to the case against petitioner.

*5 The Supreme Court has held that the harmless error rule applies to less-than-total restrictions on a defendant's right to be present at trial. *See Rushen*, 464 U.S. at 117 n.2 ("[V]iolations of the right to be present during all critical stages of the proceedings [are] . . . as with most [violations of] constitutional rights, . . . subject to harmless-error analysis, . . . unless the

deprivation, by its very nature, cannot be harmless.") (citations omitted); *see also Yarborough v. Keane*, 101 F.3d 894, 897 (2d Cir.1996) (defendant's exclusion from in camera examination of witness who testified at trial was subject to harmless error rule), *cert. denied*, __ U.S. __ (1997). "[T]he exclusion of a defendant from a trial proceeding should be considered in light of the whole record." *United States v. Gagnon*, 470 U.S. 529, 526-27 (1985).

The brief questioning of Officer DeBenedictus in this case was even less significant than the hearing held to be harmless error in *Yarborough*. There, the trial judge took brief testimony from a witness outside the presence of the defendant, but his attorney was present. *Yarborough*, 101 F.3d at 895. The questioning concerned whether the witness' presence in the courtroom during a previous witness' testimony would influence his own. The witness ultimately testified against the defendant, and the Second Circuit applied the harmless error rule: "[I]f this incident was error, it was of such minimal importance to the fair structure of the criminal proceeding that it cannot fall within [the] classification of structural error[ ]." *Id.* at 898. The same is true here. Moreover, petitioner's related claim, that he was excluded from the *Sirois* hearing, Petitioner's Brief at 21, is not only contradicted by the transcript in which petitioner's counsel notes his presence, Tr. 286, but is likewise harmless because nothing came of the hearing.

B. *Deprivation of Right to Counsel*

Petitioner also claims that the trial judge improperly directed defense counsel not to inform petitioner that Denise Hill was likely to testify. This order allegedly deprived petitioner of his right to effective assistance of counsel. Specifically, because of the limited "gag order", petitioner argues that he was unable to assist his lawyer in preparing to cross-examine Hill. Petitioner's Brief at 22-23. Petitioner relies primarily on *Geders v. United States*, 425 U.S. 80 (1976), where the Supreme Court

held that an order completely barring a defendant from conferring with counsel during an overnight recess between the defendant's direct and cross examination violated the Sixth Amendment.

Subsequently, in *Perry v. Leeke*, 488 U.S. 272, 280 (1989), the Supreme Court distinguished *Geders*. In *Perry*, as in *Geders*, the defendant testified in his own defense. During a fifteen- minute recess, the trial judge prohibited him from communicating with his lawyer—or anyone else—in any way. *Id.* at 274. The Supreme Court held that the legitimate justification of preventing unethical witness "coaching"—which was the only plausible subject of discussion between lawyer and client during the fifteen-minute recess—justified the complete prohibition. *Id.* at 282. *Perry* distinguished *Geders* as a case that implicated the defendant's right to consult with his lawyer on the full range of matters one would expect a defendant to discuss during an overnight recess, "such as the availability of other witnesses, trial tactics, or even the possibility of negotiating a plea bargain." *Id.* at 284. Although the defendant-witness might still discuss his ongoing testimony with his lawyer in the *Geders*-type case, the interest in preventing "coaching" could not outweigh the defendant's broader right to consult with his lawyer. In *Perry*, however, the defendant's ongoing testimony was the only topic of conversation curtailed by the ruling, and the trial court's truth-seeking function outweighed the limited restriction placed on the right to counsel in those circumstances.

*6 Like *Perry*, the prohibition in this case did not prevent defendant from conferring with his counsel "altogether." *Perry*, 488 U.S. at 280 (citing *Strickland v. Washington*, 466 U.S. 668, 692 (1984)). Indeed, it did not preclude petitioner from seeking any advice or guidance from his lawyer, and his lawyer was free to discuss anything relating to the trial except the fact that Denise Hill was again likely to testify. This restriction was justified by the prior threats against Denise Hill.

Moreover, even if it was unjustified, it did not prejudice petitioner in any way.

While the Supreme Court has suggested that a petitioner need not prove prejudice when he is deprived of his right to confer with counsel "altogether," *see Perry*, 488 U.S. at 280; *Jones v. Vacco*, 126 F.3d 408 (2d Cir.1997) (calling a complete ban on communication over four days a "structural defect"), this case is not about denying a defendant the right to confer with counsel; rather, it is about denying a defendant access to a single piece of information. As such, it is much closer to cases where a defendant has been denied access to evidence material to his defense. In those cases, even where the material was exculpatory, the Second Circuit has held that reversal was not required where the evidence was produced within a sufficient time for the defense to make use of it. *See United States v. Barnes*, 604 F.2d 121, 150 (2d Cir.1979) (finding no Brady violation where material was given to defense counsel at the end of witness' testimony, because defendant could have recalled witness for further cross-examination), *cert. denied*, 446 U.S. 907 (1980); *United States v. Cowles*, 503 F.2d 67, 68 (2d Cir.1974) (finding that defendant was not prejudiced by surprise witness testimony where counsel was offered and declined a continuance), *cert. denied*, 419 U.S. 1113 (1975); cf. 18 U.S .C. § 3500(a), (b) government not required to produce witness statements until witness has completed direct testimony).

The only effect of the "gag" order was to deprive petitioner (not his lawyer) of information that Denise Hill again intended to testify against him. Petitioner's claim that he was somehow prevented from helping prepare the cross-examination of Denise Hill ignores the fact that Denise Hill was previously called to testify at the trial. (Tr. 230). Only when she was first called did it become apparent that she was unwilling to testify. Counsel must have been prepared to cross-examine Denise Hill when she was first called, and he had ample opportunity to consult with petitioner in preparation for

her testimony. In fact, the "gag" order ended when Denise Hill was called to the stand for the second time. Because the trial judge recessed for lunch between direct and cross examination, we may presume that petitioner had an opportunity to consult with his attorney as to any matters relevant to potential cross-examination. Moreover, the transcript reveals that counsel consulted directly with his client at least once during his cross-examination of Denise Hill. (Tr. 431). If he required more time to prepare and consult with petitioner between direct and cross, particularly in light of the previously-imposed gag order, defense counsel could have requested it. The failure to do so plainly shows that petitioner was not prejudiced. Under these circumstances, there is no more reason to set aside the judgment of conviction than if exculpatory material had been belatedly produced at trial.

*7 Moreover, the Appellate Division's rejection of petitioner's claim must be evaluated in light of the standards applicable to the resolution of petitions filed after April 24, 1996, the effective date of the amendments to 28 U.S.C. § 2254 made by the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. 104-132. Specifically, Section 2254 provides that a petition for a writ of habeas corpus "shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States ." 28 U.S.C. § 2254(d)(1). As Judge Posner recently observed: "[t]he statute commends deference to the state court's judgment by using the word 'unreasonable', which is stronger than erroneous and may be stronger than clearly erroneous." *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir.), *cert. denied*, __ U.S. __. In this case, the Appellate Division held that

> [t]he ruling in issue here was of very limited scope. The court did not prohibit all conversations be-

> tween the defendant and his attorney, but only discussion relating to the likelihood that the witness in question would testify . . . cf., *Geders v. United States*, 425 U.S. 80. Under the circumstances present here there was no error of law requiring reversal (*see, Perry v. Leeke*, 488 U.S. 272).

People v. Morgan, 176 A.D.2d at 359-60, 574 N.Y.S.2d at 593. The Appellate Division's ruling was not an unreasonable application of *Perry* and *Geders*, and, accordingly, petitioner's right to counsel claim must be denied.

II. THE LIMITATION ON CROSS-EXAMINATION OF DENISE HILL AND THE ADMISSIBILITY OF GLADSTONE SMITH'S TESTIMONY

Petitioner also argues that the trial judge improperly curtailed defense counsel's cross-examination and impeachment of Denise Hill. This is one of the claims raised in petitioner's *pro se* brief in the Appellate Division. Before turning to the merits of this claim, I set forth here the reasons for my conclusion that the issue was not properly raised in petitioner's application for leave to appeal to the Court of Appeals.

By letter dated October 10, 1991, the Legal Aid Society applied for leave to appeal to the New York Court of Appeals on behalf of petitioner. Consistent with the applicable rules, the letter was addressed to the Chief Judge and was sent to the attention of the clerk of the court for designation of a judge to rule on the application. McKinney's 1997 N.Y. Rules of Court § 500.10(a) (22 N.Y .C.R.R. 500.10(a)). Anticipating such a designation, the leave letter was bare bones in nature. Specifically, counsel asked that she be advised of the judge designated so that she could "send that judge a follow-up letter in support of the application" which requested that the Court of Appeals "consider and

review all issues outlined in defendant-appellant's brief and *pro se* supplemental brief."

*8 The initial leave letter appears to reflect the usual practice of filing an application that does not contain any argument and then filing a more detailed supplemental letter after a judge is designated to hear the application.[4] Accordingly, on November 7, 1991, after being apprised that the application had been assigned to Judge Hancock, petitioner's counsel addressed a follow-up letter to him in which she specifically identified "the question presented by this case" as follows:

> The question presented by this case is whether the court deprived appellant of his right to counsel when it prevented counsel from communicating with appellant overnight regarding the complaining witness's decision to testify.

After detailing the factual basis for the claim, the letter continued by arguing that "[l]leave should be granted so that the Court might address whether there is a distinction in cases where the ban prohibits counsel from discussing with the defendant his testimony during a break in his cross- examination."

The letter also drew attention to "Point IG in appellant's supplemental *pro se* brief" and a recent case that supported the claim that a new trial was required because petitioner was denied his right to be present at a hearing to elicit facts surrounding petitioner's alleged intimidation of the principal witness against him. The pertinent part of the letter then concluded by asking that "[f]or the reasons stated above, we urge that leave to appeal be granted."

In a letter in opposition to the application for leave, dated November 15, 1991, the District Attorney ad-

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[4] The practice is described in a letter/memorandum in another habeas corpus case pending before me. *See* Letter of Jay L. Weiner, dated September 10, 1997 at p.2, filed in *Nieblas v. Smith*, 95 CV-3442. A copy of the letter has been made part of the record here.

dressed in detail the two issues raised in petitioner's second leave letter and concluded by arguing that "[t]he Appellate Division also properly concluded that ... the claims raised in [Petitioner's] *pro se* supplemental brief did not warrant reversal." On January 23, 1992, the application for leave to appeal was denied. *People v. Morgan*, 79 N.Y.2d 861, 580 N.Y.S.2d 733 (1992).

The October 10, 1991 letter applying for leave to appeal to the Court of Appeals, which was the first of two filed on petitioner's behalf by the Legal Aid Society, specifically incorporated petitioner's *pro se* supplemental brief and the remaining six claims. If there had not been a follow-up letter, this leave application could have arguably been sufficient to alert the Court of Appeals to the fact that petitioner sought leave with respect to each of the issues raised in the *pro se* supplemental brief. *See Meatley v. Artuz*, 886 F. Supp. 1009, 1013-14 (E.D.N.Y. 1995) (holding that leave application which did not refer to any specific claim, but attached Appellate Division brief, "fairly presented" claims raised in Appellate Division to Court of Appeals). The November 7, 1991 letter, however, specifically addressed only two of petitioner's claims in a way that clearly suggested that these were the only issues on which leave was sought. Indeed, had I been the judge to whom the leave application was assigned, I would have assumed that the only issues being pressed in the leave application were those alluded to in the letter of November 7, 1991.

*9 Thus, there is a serious question whether petitioner properly preserved the balance of the issues raised in the Appellate Division brief and, accordingly, whether those claims were exhausted in the state courts or procedurally forfeited. *Grey v. Hoke*, 933 F.2d 117, 120 (2d Cir.1991), and *Thebner v. Miller*, 788 F. Supp. 714 (E.D.N.Y.1992), are instructive. In *Grey*, the petitioner submitted a letter application to the Court of Appeals which specifically addressed his search and seizure claim, but also attached his Appellate Division brief, which had addressed two additional claims. *Grey*,

933 F.2d at 120. The Second Circuit found that the two claims not addressed in the letter application were not fairly presented to the Court of Appeals. *Id.* Relying on *Grey*, Judge Wexler came to the same conclusion in *Thebner v. Miller*. Petitioner's letter application there specifically addressed his search and seizure claim. Expressly referring to the Appellate Division brief which was enclosed with the letter, petitioner wrote: " 'Numerous other issues are raised in defendant-appellant's brief all of which deserve review by this court.' " 788 F. Supp. at 717. On these facts, Judge Wexler held that only the search and seizure claim was fairly presented to the Court of Appeals. *Id.*

The procedure followed by the Legal Aid Society on petitioner's behalf provides a more compelling case for finding a failure to exhaust than in *Thebner v. Miller*. The supplemental leave letter here plainly suggested that petitioner was relying on only the claims specifically raised in the letter. Such a suggestion defeats the purpose of requiring a habeas petitioner to first present his claims of error to the state courts. Because the judge to whom the leave application was assigned could reasonably assume that the only issues presented to him were those pressed in the supplemental leave letter, the remaining claims in petitioner's *pro se* Appellate Division brief were simply not exhausted and are now procedurally forfeited.

My reliance on the procedural forfeiture as a basis for rejecting the claims not properly raised in petitioner's application for leave to appeal to the Court of Appeals represents a departure from my usual practice. I prefer to pass over the procedural basis urged by the District Attorney and decide a habeas corpus petition on the merits. Nevertheless, these procedural bars cannot be overlooked in cases in which the petition would otherwise have to be granted. Moreover, when the merits raise issues that involve close calls and the necessity for evidentiary hearings, it seems to me the sounder course to dispose of the case on the procedural forfeiture

ground. This case falls within the latter category for the reasons that I now proceed to show in discussing the merits of petitioner's claim that the trial judge improperly curtailed his cross-examination of Denise Hill.

Hill was the sole eyewitness to testify at trial and her credibility was therefore central to this case.[5] Although she gave a contemporaneous prior statement consistent with her trial testimony, and a plausible explanation for the inconsistent statement she had given to the police a few minutes earlier, petitioner's trial counsel nevertheless asked Denise Hill whether "anyone threaten[ed] or force[d] you to testify in this case?" (Tr. 476).

*10 Before Denise Hill could answer, the trial judge called a sidebar, because she was concerned that defense counsel's question would "raise a hornet's nest in connection with threats" by opening the door to testimony that Hill had been threatened by petitioner's friends not to testify. (Tr. 477). The trial judge had previously excluded this evidence from the case. Subsequent colloquy made it plain that the trial judge would not permit Hill to be asked a more precisely worded question as to whether she had been threatened by the prosecutor and that she would not permit extrinsic evidence to rebut Hill's denial of such threats. The reason given for this ruling was that this evidence was "collateral." (Tr. 480).

Calling the issue of Hill's credibility "collateral", however, does not dispose of this issue. Where a witness' credibility is crucial to a case, evidence that suggests a reason or motive to lie is not "collateral". "Evidence of a witness' bias, interest or hostility, is not subject to the limitations of the so-called 'collateral matter rule.'" Prince, Richardson on Evidence § 6- 415 (11th Edition, Farrell) (collecting New York cases); *see also* Christo-

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[5] Although "Monk" and "Randy" were in the apartment at the time of the shooting, Denise Hill said that they would not testify because they feared they and their families would be killed if they did. (Tr. 260, 318).

pher B. Muller & Laird C. Kirkpatrick, Federal Evidence (2d Ed.) § 307 (collecting federal cases). Nevertheless, to obtain relief here petitioner must do more than show that the trial judge erroneously excluded relevant evidence. Instead, petitioner can prevail only if he can demonstrate that "'the omitted evidence [evaluated in the context of the entire record] creates a reasonable doubt that did not otherwise exist.'" *Justice v. Hoke*, 90 F.3d 43, 47 (2d Cir.1996) (quoting *United States v. Agurs*, 427 U.S. 97, 112.

Unlike *Justice v. Hoke*, where the offer of proof came in the form of testimony elicited from a prospective witness and from a more explicit outline of the proffered testimony, here neither witness testified. Accordingly, there is no way of knowing from this record how Denise Hill would have answered defense counsel's question whether she was threatened or forced to testify. Indeed, in response to the suggestion of defense counsel that Denise Hill had been threatened by the government, the Assistant District Attorney emphatically denied any threats: "And I object to counsel [sic] reference that this witness was threatened to testify. This witness was threatened not to testify. The safety of her family has been threatened." (Tr. 480). Moreover, because the testimony of a witness may not be bolstered by a prior consistent statement, petitioner's desire to call Gladstone Smith suggests that he expected Hill to deny being threatened. According to petitioner, Gladstone Smith was

> an inmate who was on the same floor, they were separated by a rail, sort of a fish net-type of rail where you couldn't reach in but you could see, stated to the effect that this witness, Denise Hill, told her that the mother of the deceased, I think it was her stepmother, was forcing her to testify; that she didn't want to testify; and as a result of their forcing her, she was going on the stand, but she was not comfortable going on the stand because she was saying things that weren't true.

*11 (Tr. 523-24).

The trial judge decided preliminarily, (Tr. 526), and later definitively, that she would not allow the proffered testimony, the "offer of proof being allegedly that Miss Hill was forced and pressured into testifying in this case." *Id.* at 688. Referring to an earlier colloquy, the trial judge explained:

> I previously ruled when we had our pre-charge conference, that I would not permit introduction of such testimony, that being collateral.
>
> There is nothing to indicate that the witness, Denise Hill, concocted a story or manufactured the testimony that she gave. In fact, the District Attorney attempted to elicit on her direct examination that it was the defendant and friends of the defendant who were pressuring the witness Miss Hill not to testify.
>
> I would not permit that testimony to come in as that is collateral.

(Tr. 688).

Moreover, although the trial judge had signed a subpoena for Gladstone Smith, he was not produced by the Department of Corrections. This was apparently because the use of a subpoena, as opposed to a specific order of the trial judge, is not the appropriate way to obtain the appearance of a potential witness incarcerated at Rikers Island. Nevertheless, after a colloquy with respect to the defense's attempt to produce Gladstone Smith, the trial judge made the following ruling:

> The Court would not permit you, had this witness from Rikers Island been produced by Corrections, based upon the offer of proof that has been elicited by you, Counsel, I would not permit that testimony to be brought before the jury, as it is collateral. You have an exception. (Tr. 689).

Under these circumstances, it is simply not possible

to conclude that the excluded testimony would have altered the outcome at trial. *See Kyles v. Whitley*, 514 U.S. 419 (1995) (holding that evidence is material on a Brady claim only "'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'") (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)).[6] The undisputed evidence at trial was that Denise Hill gave a statement to detectives at the hospital on the morning of the shooting (at which she was wounded). She and one of the detectives who took her statement testified at trial, and the statement was consistent with her trial testimony. Indeed, the admission of her bedside statements implicating petitioner is sufficiently compelling that petitioner argues in a separate point that it improperly "bolstered" Hill's testimony and was sufficiently prejudicial to warrant a new trial. Petitioner's Brief at 37-41.[7] Gladstone Smith was hardly someone of impeccable character and it is unclear what effect he would have had on the jury. Indeed, allowing the questioning of Denise Hill on this issue—and Gladstone Smith's testimony to contradict her (assuming she denied making the statement)—would surely have opened the door to the inflammatory testimony of threats Hill had received from petitioner and his associates to prevent her from testifying. Because Denise Hill was never questioned on this issue, and Gladstone Smith was not called, it is not possible to say with any certainty what would have happened. Indeed, for this reason, it has been suggested

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[6] This is the standard that applies here. *See Justice v. Hoke*, 90 F.3d at 47-48; *Taylor v. Curry*, 708 F.2d 886, 891 (2d Cir.) (citing *United States v. Agurs*, 427 U.S. 97, 112 (1976)), *cert. denied*, 464 U.S. 1000 (1983).

[7] Petitioner claims that the admissibility of these statements violated the Confrontation and Due Process Clauses. This argument is frivolous because the statements were clearly relevant, *see Estelle v. McGuire*, 502 U.S. 62 (1991), and Denise Hill was available for cross-examination. *California v. Green*, 399 U.S. 149, 158 (1970).

that, "[f]rom every standpoint except cost, the question and answer form [of an offer of proof] is the one best calculated to show the reviewing court the impact of the excluded evidence." 21 Charles Alan Wright and Kenneth W. Graham, Jr., Federal Practice and Procedure § 5040 at 214 (1977) As the Wright and Graham treatise goes on to explain:

> *12 Affidavits or avowals by counsel will usually be shaded to favor the party. Moreover, the question and answer method has the advantage of preserving the evidence for use should the witness be unavailable at any retrial. If the offer is taken in question and answer form, opposing counsel may be permitted to cross-examine the witness to develop any factors which would put the proffered testimony in its true light. *Id.*

This question and answer method was not used here, and I cannot say that it was the fault of petitioner's counsel. See 28 U.S.C. § 2254(e)(2). Under these circumstances, although I believe that the line of questioning precluded by the trial judge would have been a disaster for petitioner, I do not reach any final conclusion because a hearing may be required to at least determine what Denise Hill, if not Gladstone Smith, would have said if questioned. There is language in *Justice v. Hoke*, supra, that suggests that, if the testimony is helpful on its face, its exclusion cannot be justified because it does not appear to be credible. *Justice*, 90 F.3d at 49-50. While this standard seems to me to confuse the standard for the admission of evidence with the standard for determining whether its exclusion violates the Due Process Clause, it reflects the prevailing Second Circuit view. I decline to hold a hearing until the Court of Appeals determines whether I have correctly concluded that the issue was procedurally forfeited.[8]

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[8] Petitioner was also precluded from impeaching Hill's credibility with a letter in which she professed her love for him (notwithstanding the shooting). Any error caused by the exclusion of the letter was

CONCLUSION

The Petition for a writ of habeas corpus is denied. I grant a certificate of appealability with respect to the following issues: (1) whether petitioner was deprived of his right to confer with counsel; (2) whether the application for leave to appeal to the Court of Appeals properly preserved the issue raised in petitioner's supplemental brief regarding the cross-examination of Denise Hill and the admissibility of the impeachment testimony of Gladstone Smith. The District Attorney is free to argue, as an alternative ground for affirmance that the latter claim does not justify relief, and that the petition was not timely filed.

So Ordered.

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harmless, however, because defense counsel elicited Denise Hill's testimony that she still loved petitioner. (Tr. 411).

COURT OF APPEALS
STATE OF NEW YORK

January 23, 1992

APPELLATE DIVISION–SECOND DEPARTMENT
KINGS COUNTY

September 30, 1991

PEOPLE

– v.–

MORGAN (DARIUS)

Applications in criminal cases for leave to appeal denied January 23, 1992 (Hancock, Jr., J.)

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION–SECOND DEPARTMENT

September 30, 1991

THE PEOPLE, ETC.,

Respondent,

– v.–

DARIUS MORGAN,

Appellant.

**593 Philip L. Weinstein, New York City (Rosali Vasquez, of counsel), for appellant.

Darius Morgan, *pro se*.

Charles J. Hynes, Dist. Atty., Brooklyn (Jay M. Cohen, Anthea H. Bruffee and Camille O'Hara Gillespie, of counsel), for respondent.

Before:

THOMPSON, J.P., and BRACKEN, ROSENBLATT and O'BRIEN, JJ.

MEMORANDUM BY THE COURT

*359 Appeal by the defendant from a judgment of the Supreme Court, Kings County (Heller, J.), rendered June 28, 1989, convicting him of murder in the second degree and attempted murder in the second degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

During the trial of this case, the prosecutor indicated to the court that the People's main witness had indicated to her that she would not testify against the defendant because she feared for the safety of her family. After the prosecutor moved for a hearing to determine if the defendant was responsible for the witness being intimidated (*see, Matter of Holtzman v. Hellenbrand*, 92 A.D.2d 405, 460 N.Y.S.2d 591), the court adjourned the case to the following day. The next afternoon the prosecutor informed the court outside the defendant's presence that the reluctance of the witness to testify was waning. However, the court decided to proceed with a hearing and directed defense counsel not to discuss with the defendant the increased likelihood that the witness would testify in this case. This gag order was in effect during an overnight recess.

The defendant claims that the court's instruction violated his right to the effective assistance of counsel. We disagree. Not every restriction upon a defendant's access to his attorney constitutes reversible error *per se*. The ruling in issue here was of very limited scope. The court did not prohibit all *360 conversations between the defendant and his attorney, but only discussion relating to the likelihood that the witness in question would testify (*see, People v. Narayan*, 88 A.D.2d 622, 449 N.Y.S.2d 1008; *cf., Geders v. United States*, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592). Under the circumstances present here there was no error of law requiring reversal (*see, Perry v. Leeke*, 488 U.S. 272, 109 S.Ct. 594,

102 L.Ed.2d 624; *cf.*, *People v. Blount*, 159 A.D.2d 579, 552 N.Y.S.2d 441, *affd.* 77 N.Y.2d 888, 568 N.Y.S.2d 908, 571 N.E.2d 78).

The defendant's assertion that the police officer's testimony regarding the statement made by the witness in question at the hospital following the incident which inculpated the defendant constituted impermissible bolstering by the People has not been preserved for appellate review as a matter of law (*see*, CPL 470.05[2], *People v. Love*, 57 N.Y.2d 1023, 457 N.Y.S.2d 474, 443 N.E.2d 948). In any event, in view of the strength of the People's case, the alleged error must be deemed harmless (*see*, *People v. Crimmins*, 36 N.Y.2d 230, 242, 367 N.Y.S.2d 213, 326 N.E.2d 787).

We have considered the defendant's remaining contentions, including those raised in his supplemental *pro se* brief, and find them to be without merit.